

No. 16470

United States
Court of Appeals
For the Ninth Circuit

CARL E. OAKS, WILLIAMS BROTHERS COMPANY, McLAUGHLIN, INC., and MARWELL CONSTRUCTION COMPANY, LTD.,

Appellants,

vs.

STUART CONSTRUCTION CO., INC., a Corporation, and STUART E. TOPE,

Respondents.

Transcript of Record
In Two Volumes

Volume II
(Pages 343 to 698)

Appeal from the District Court
of the District of Alaska,
Third Division

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(Testimony of Stuart E. Tope.)

“Question: How long have you been in the construction business, Mr. Tope? Answer: 16 years.

“Question: During the course of that time, have you had a number of subcontracts or is this the only one you ever had? Answer: This is the only one I ever had.

“Question: This is the only subcontract? Answer: That is right.

“Question: You have been a contractor most of the time rather than subcontractor, is that correct? Answer: That is correct.

“Question: You spoke of computing this \$53,000 odd dollar figure on an hourly basis, who hired you on an hourly basis? Answer: Mr. Oaks.

“Question: And at that time, did you set unit prices for all the equipment that you were going to furnish? Answer: No; we didn't.

“Question: Was there any agreement as to [325] how much equipment you would furnish? Answer: I don't believe there was anything said about it.

“Question: Did you agree to a wage that you would be paid personally? Answer: Yes.

“Question: I don't recall, Mr. Tope, did you ever tell me how much of this land you cleared before you left the job; I remember some discussion between us about it, but I don't remember what you answered or if you answered; do you recall? Answer: No; I don't. I said I don't know; I just don't know.

“Question: That is right, I remember now, we

(Testimony of Stuart E. Tope.)

were dickering in feet and miles and so on. You said you did not know? Answer: That is right.

“Question: Well, do you consider it important how much you cleared since you were working on an hourly basis? Answer: No; it wasn’t important.

“Question: Did you turn in time cards for hours worked? Answer: For my hours?

“Question: Well, we will take that first. Yes, for your personal hours? Answer: Yes; I turned them in to Mr. Hager.

“Question: How about for your equipment? Answer: Mr. Hager turned that in.

“Question: You didn’t turn anything in [326] yourself? Answer: No.

“Question: Well, now, this fifty-three thousand odd dollar figure, is that taken from Hager’s records then? Answer: It was taken off the payroll records, according to the men who were on the cats at that time.

“Question: Payroll reports kept by whom? Answer: Oaks Construction Company.

“Question: Did you give any notice to the contractor of your claim against Oaks? Answer: I gave it to the N. C. Company.

“Question: And only to the N. C. Company? Answer: I don’t remember.

“Question: How much notice, if any, did you give prior to the time that you stopped work on the pipeline job? Answer: I can’t tell you that.

“Question: Why? Answer: I just don’t know.

“Question: Do you remember whether it was a

(Testimony of Stuart E. Tope.)

fairly long period or a fairly short period? Answer: I just don't know." That is at the top of page 56, your Honor. I have no particular desire to read any more of that deposition.

Redirect Examination

By Mr. Nesbett:

Q. Now, Mr. Tope, during the time you were employed on this clearing job, where would [327] you take your meals and spend your nights?

A. It depended on where I was. If I was after parts in Fairbanks, why I would stay various places.

Q. Did you have any home in that area that you could go to and cook your meals and sleep?

A. No.

Q. Well, then, where would stay at evenings?

A. In roadhouses.

Q. And those checks that Mr. Dunn was questioning you about, were those checks you passed as you were traveling up and down the highway, or for your meals and lodging in these places?

A. That is right.

Q. Did you pay your expenses out of the two hundred and fifty per week that you got from Mr. Oaks?

A. While I was in transit along the—above—like going to Fairbanks and back, yes, but the—they did deduct some of it—they were allowed, I

(Testimony of Stuart E. Tope.)

think, five dollars and some cents out of my pay check a day towards my room and board.

Q. That's when you were located in Tok?

A. That is right, in Dot Lake.

Q. You got two hundred and fifty dollars a week, but [328] your board was deducted from it?

A. A certain portion of it.

Q. Now, did you ever submit any expense account for the cost of your meals or travel up and down the highway when you were going in and out of Fairbanks for parts? A. I did not.

Q. Did you have any other bank account—did you have a personal bank account at that time?

A. I did not.

Q. Now, you were asked as to whether or not you had made any allowance for gas and oil consumption on the trucks and pickups that were used on the job. You did not make an allowance or any itemization for expenses in your Exhibit 2, which is the cost of operations analysis, did you?

A. No; I didn't.

Q. Was your monthly rental on those pieces of equipment based strictly on what you considered a fair price to let some contractor have it and use it? A. That's right.

Q. Actually, the gas and oil used in those pieces of equipment came from the five hundred [329] gallon Dodge truck fuel tank or the gasoline drums that were used on the job, didn't they?

A. That is right.

(Testimony of Stuart E. Tope.)

Q. That gas and oil was paid for by Oaks Construction Company, wasn't it?

A. That's right.

Q. Did you testify in response to a question on cross-examination that all of the equipment used on that job, or that you purchased from Northern Commercial Company was used equipment?

A. Yes.

Q. Inviting your attention, specifically to the Dodge truck, was that used equipment when you first got it and put it on the job?

A. That was brand new.

Q. May I see Exhibit F, please?

I hand you Exhibit F, Mr. Tope, do you recall the occasion when you signed that exhibit, which is a request for payment for work cleared along the right of way up to a point?

A. Yes.

Q. Who presented that to you?

A. Mr. Crawford wrote this.

Q. Would it be fair to say that that was presented to you on or about the date indicated [330] on it?

A. Just about as I remember.

Q. And what is that date, sir?

A. That's the 6th of February, 1954.

Q. And where did you sign that?

A. I believe it is—was right along the right of way.

Q. Did Mr. Crawford write out in your presence or bring it to you?

A. He wrote it out in my presence.

(Testimony of Stuart E. Tope.)

Q. Did you ever receive any money for the work set out in that request? A. Never have.

Q. Does that exhibit indicate that it was approved by Mr. Crawford? A. Yes.

Q. Did you give it back to Mr. Crawford after you signed it? A. Yes.

Q. Did you have a copy for your files?

A. No, I did not.

Q. Have you ever seen that request since the date you signed it and until today?

A. No, I never have.

Q. Did Mr. Crawford ever present you any other such statements concerning the amount of clearance [331] you had accomplished as to a percentage, as to the mileage or footage?

A. I can't recall.

Q. Were you ever paid anywhere based on the number of feet you had cleared along that right of way? A. No, I was not.

Q. Mr. Tope, you brought some stock certificates of Stuart Construction Company into court yesterday, did you not? A. Yes, I did.

Q. Were those certificates procured from a safety deposit box during the lunch hour?

A. Yes, they were.

Q. Who procured them?

A. My wife, Mrs. Tope.

Q. What did you tell her with respect to the stock certificates in your box?

A. I told her to take what Stuart Construction

(Testimony of Stuart E. Tope.)

Company stock certificates was in there and bring them here.

Q. Did you tell her to get them all?

A. I told her to get them all.

Q. Have you ever had the certificate issued to Mr.—is it Maynick? A. Maynick. [332]

Q. Yes, your brother-in-law?

A. No, I never have.

Q. Who has it? A. He has it.

Q. To your knowledge, do you have the certificate that was issued to Mr. Sanders, the attorney? Have you, to your knowledge, ever had that one share that was issued to Mr. Sanders?

A. Not to my knowledge.

Q. Now, who drew those minutes of the corporation that have been read into evidence and admitted into evidence? A. Mr. Sanders.

Q. Mr. Tope, when this contract of December 17, 1953, was signed by you, and Mr. Oaks, was there any dickering or negotiating or bidding between you and Mr. Oaks, as to how much you were to get per foot for that clearing?

A. Oh, he said we got to talk about it and we arrived at a six-and-one-half cent figure.

Q. Did he set the figure, or did you arrive at it by dickering or negotiating?

A. We arrived at the figure together.

Q. Did Mr. Oaks tell you how much he was getting per foot for the clearance? [333]

A. He did not.

Q. Do you know? A. I have no idea.

(Testimony of Stuart E. Tope.)

Q. May I see Exhibit 2, please? May I see Exhibits 2 and 3?

Mr. Tope, I will hand you Exhibit 3 and ask you to look at the dates and hour computations made on the last three pages of that exhibit; do you see them? A. Yes.

Q. Who prepared those computations?

A. I prepared these myself.

Q. And what did you do with them after you prepared them?

A. I gave them to a Mr. Hubbard, Wayne Hubbard.

Q. What do those computations show?

A. Well, it shows the number of hours worked during the week per piece of equipment.

Q. How did you prepare or determine the hours per week that each piece of equipment was used?

A. I took the man that was working on the piece of equipment and took it from the statements that Mr. Oaks had sent to me weekly.

Q. Do you know now, Mr. Tope, the last date that you received any wages—your wage of \$250.00 [334] per week for working on that pipeline?

A. It was sometime in around the first of April, but the exact date I can't tell you.

Q. Did you discontinue any work on the line after you received no further payments?

A. No, I did not.

Q. Did you continue the same sort of duties you had been performing? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Generally, when that operation first commenced on or about January 3, 1954, what was the general nature of your duties over a given day?

A. I would help grease the cats, drive the 21½-ton truck, pump fuel into them after the men got through working; I would take the men out on the job and bring them back in the evening, go after fuel and oils and lubricants.

Q. Where would you go to get that?

A. I would have to go to Tok to Mr. Bayless' place.

Q. What else generally were you occupied with?

A. Chasing parts, going to Fairbanks after parts, and coming back.

Q. Did you yourself perform any repairs or parts replacements on the caterpillars?

A. Yes, I did. [335]

Q. And did that type—were you busy eight hours a day doing that sort of thing?

A. Yes, I was.

Q. How long did you continue doing that?

A. Well, the whole length of the job.

Q. Well, did you continue to do that after your pay was discontinued, the pay of \$250.00 per week?

A. I went up and down the line seeing that—doing the best I could to keep the job going, yes.

Q. Now, I believe you testified, did you not, that you were there on the pipeline clearing area long after the clearing itself was actually finished; is that correct?

A. That is correct.

Q. What were you doing there?

(Testimony of Stuart E. Tope.)

A. Well, I was trying to pick up enough work to live on and I cleared an area strip for the Tok Lodge to help pay the bill.

Q. Well, now actually, at the time you left the clearing job, you had only one cat in operation, didn't you? A. That is correct.

Q. And you—did you take that cat with you when you left the job? [336]

A. Not at that time, they had moved out. They had moved all the rest of the men off the job and I was still there. I—and I moved the last cat, I imagine, about a week after the work was finished.

Q. And do you have all that, the hours you charged for the last week of April and up to May 1, with hours actually put on your cat by employees of Oaks Construction Company?

A. To the best of my knowledge, yes.

Q. Where was that cat after May 1, was it—where did you get it?

A. Well, it was away out in the—along the right of way and with the starting motor out of it and it wasn't—the crankshaft was—the bearings had—

Mr. Dunn: I object, not responsive; he asked him where it was.

Mr. Nesbett: He was just saying right along the right of way.

The Court: Counsel makes objection and I have forgotten, did you ask him where it was? Now, he could answer that and then, of course, you could ask him about these other matters. [337]

(Testimony of Stuart E. Tope.)

Q. (By Mr. Nesbett): What did you do with the cat?

A. I had to take another cat out and start it and I took it back to Dot Lake.

Mr. Nesbett: No other questions, your Honor.

The Court: No other questions? Is there any recross?

Mr. Dunn: None, your Honor, thank you.

The Court: No recross. Call your next witness.

(Whereupon Mr. Tope was excused.)

THOMAS K. DOWNS,

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. Is your name Thomas Downs?

A. Thomas K. Downs.

Q. Thomas K. Downs. Where do you live, Mr. Downs? A. Fairbanks.

Q. And what is your business?

A. Credit manager of the Northern Commercial Company in Fairbanks.

Q. How long have you held that position? [338]

A. Sixteen years.

Q. I'll hand you Exhibit 4 and ask you if you recognize those papers?

A. Yes, I recognize them.

Q. What are they, Mr. Downs?

A. These are rental contracts with an option to

(Testimony of Thomas K. Downs.)

purchase and into which we entered with Stuart Tope.

Q. Do you recall the general times that those agreements were entered into? Do you remember the occasions when the equipment was sold or rented to Mr. Tope? A. I recall the occasion.

Q. How long have you known Mr. Tope?

A. Approximately four and a half to five years.

Q. And can you advise the Court how much was paid by Mr. Tope as rental under those contracts?

The Court: Under all these contracts?

Q. Yes.

The Court: As I recall, it was approximately \$8600.00.

Q. Was the total rental payment on all of that equipment? A. Yes.

Q. Do you know approximately when those payments [339] were made?

A. As I recall, one payment was made in August and I believe another payment was made in September or October, 1953.

Q. Do you know where that money came from that was used to pay on those contracts?

A. Yes, I do.

Q. Where?

A. Three thousand some odd hundred dollars came from the assignment we had with Mr. Tope for work he had done for the Munter Construction Company, and the balance came from the assignment we had from the Oaks Construction Company.

Q. Now, you recall, do you not, receiving an

(Testimony of Thomas K. Downs.)

assignment from Mr. Tope or Stuart Construction Company, Inc., to Northern Commercial Company of all funds due him for work done, either snow removal or pipeline clearing work; do you recall receiving such an assignment from Mr. Tope?

A. Yes, I do.

Q. And Exhibit D, would that be the assignment or a copy of the assignment?

A. That is a copy of the assignment.

Q. Had you previously prior to that assignment [340] received similar assignments from Mr. Tope or Stuart Construction Company, covering work for other people or contracts?

A. Yes, we had.

Q. And was that a customary way of collecting payments on equipment sold to Mr. Tope?

A. Yes, it was.

Q. And, Mr. Downs, did Northern Commercial Company ever receive any money from, as equipment rental on the equipment purchased by Mr. Tope, by reason of that assignment?

A. Yes, I believe, we received, as I understand it, approximately five thousand dollars on a settlement for ten thousand dollars that was entered into by a representative of our company from Seattle and Mr. Oaks.

Q. Now, would that be, to your knowledge, the only payment your company would have received from—or rather received as payment on those rental options to purchase contracts?

A. To my knowledge that is the only one.

(Testimony of Thomas K. Downs.)

Q. Do you recall discussing with Mr. Tope, the possibility of collecting monies from him for work he had performed on the pipeline in approximately June of 1954? [341]

A. Yes.

Q. Where did such discussions take place.

A. Took place in my office in Fairbanks.

Q. And did—was anything done in connection with those discussions; was Mr. Tope able to pay you anything on the rental purchase contracts?

A. No, he wasn't.

Q. Did he explain why he couldn't pay?

A. Yes, he did.

Q. Did you do anything as a result of those conferences with Mr. Tope, in connection with payments?

A. Yes, I went to see our attorney in Fairbanks, with Mr. Tope, in an effort to find some basis for settlement.

Q. And did you do anything in connection with obtaining payments for Northern Commercial Company for the work Mr. Tope had done on the pipeline?

A. Yes, I wrote a letter to Williams Brothers—McLaughlin & Marwell, who were the prime contractors on the pipeline.

Mr. Dunn: Your Honor, I object and move to strike so much of the answer that the witness has given; I don't see what possible [342] relevancy the correspondence between Northern Commercial Company and Williams Brothers-McLaughlin & Marwell would—

(Testimony of Thomas K. Downs.)

The Court: Counsel asked what move he made towards this equipment when Mr. Tope told him he couldn't pay anything on it. Now, he says he wrote, he can't tell what he wrote; he can just say he wrote.

Mr. Nesbett: Well, your Honor, I was under the impression he could tell, Williams-Marwell are a party to the case and Mr. Dunn represents them. They are the prime contractor and they're supposed to have notice under the Miller Act.

The Court: They are named as defendants, yes, then he can tell what was said in the letter.

Mr. Nesbett: You mean he——

The Court: Yes, he can; I didn't——

Q. (By Mr. Nesbett): Did you send a letter then to Williams Brothers? A. Yes, I did.

Q. Do you have a copy of that letter that you mailed?

A. It is here in court, I understand, yes. [343]

Q. Do I have it here in this brief case of yours?

A. Yes.

Q. Can you find that copy of that letter you wrote to Williams Brothers?

Mr. Dunn: I renew my objection, your Honor, on the ground of relevancy. Suppose that he did write Williams Brothers, what does it have to do with how much money is owed between Tope and Oaks?

The Court: It refers to the matter of adjustment on these claims and it may not be relevant at all; I can't tell at this time.

(Testimony of Thomas K. Downs.)

A. I have here my copy of the letter I wrote to Williams-McLaughlin and Marwell.

Q. (By Mr. Nesbett): What is the date of that letter, Mr. Downs? A. June 16, 1954.

Q. And to whom is it addressed?

A. Williams Brothers-McLaughlin & Marwell.

Q. Who signed the letter?

A. I signed it.

Q. And was the letter sent regular mail or in any special manner?

A. It was sent registered mail with return receipt.

Q. Was return receipt received on it? [344]

A. I don't know for sure.

Q. Did you receive a reply?

The Court: If it were mailed, it presumes they received it, if he stamped it and mailed it, why the presumption of the law is that they received it.

Q. Did you receive a reply from him later on to this letter? A. Yes, I did.

Q. We offer this in evidence, your Honor.

Mr. Dunn: Well, your Honor, I object to its admissibility again, on the grounds of relevancy.

Q. I suppose I will have to submit it to you before you can——

The Court: Well, I don't care to look at it; the objection is overruled at this time. If it does not become relevant and material you can move to strike it out.

The Clerk: It will be 7.

The Court: Plaintiff's Exhibit 7.

(Testimony of Thomas K. Downs.)

Mr. Nesbett: I should like to read this letter, your Honor.

The Court: Very well. [345]

Mr. Nesbett: (Reading Exhibit 7):

“Fairbanks, Alaska

June 16, 1954

Williams Brothers, McLaughlin-Marwell

Joint Ventures Office

Tok, Alaska

Attention: Mr. Curr

Gentlemen:

“Enclosed is a statement of our account with Stuart E. Tope d/b/a Stuart Construction Company, Inc., covering material, supplies, and equipment rental applicable to the Haynes-Fairbanks pipeline clearing contract. As itemization of parts and supplies furnished is necessarily lengthy, it is not presented herewith but can be made available at any time.

“All tractors and the truck were furnished under a formal written rental agreement, properly filed. Further, Mr. Tope assigned to us all his earnings under pipeline clearing contract, which assignment was accepted by Oaks Construction Company to December 2, 1953. The original of this accepted assignment is in our files.

“Please note the last item on the statement is a charge for \$4,000.00 for a used replacement engine for one of the rented tractors. The original engine

(Testimony of Thomas K. Downs.)

was damaged beyond repair by the contractor while on the job. We felt that charging the cost of the new [346] engine would be unfair, and, therefore, arrived at the \$4,000.00 figure as being reasonably the cost of a new engine less the depreciation on the original engine, to arrive at a figure representing the expected remaining life of original engine under normal use.

“We shall much appreciate your early consideration of the enclosed statement and ask that you advise us as soon as possible your position in this matter.”

“Sincerely yours,

NORTHERN COMMERCIAL COMPANY
T. K. DOWNES, Credit Manager.”

And attached, which I will not read unless counsel desires it, is a statement of Northern Commercial Company outlining tractor rental on various pieces of equipment and engine replacements; the total of which is \$22,865.97.

Q. Now, Mr. Downs, did you say that you received——

Mr. Dunn: Now that you have heard it, your Honor, I renew my motion, only this time it will have to be strike.

The Court: Now that I have heard it, I will be inclined to overrule your motion permanently. I don't know if you will have the right to strike it out later, but it appears [347] that it may be connected up in a way that makes it very competent

(Testimony of Thomas K. Downs.)
and relevant.

Q. (By Mr. Nesbett): Mr. Downs, did you say that you received a reply from Williams Brothers to that letter? A. Yes, I did.

Q. Do you have a copy of that letter that you received? A. I think I have the original.

Q. Will—

A. I have the original letter here.

Q. And what is the date on that letter?

A. July 28, 1954.

Q. And to whom is it addressed?

A. To Northern Commercial Company, attention, T. K. Downs.

Q. And did you receive that letter at your office in the Northern Commercial Company in Fairbanks, Alaska, on or about the date indicated on the letter? A. Yes, I did.

Q. Your Honor, we offer this letter into evidence.

Mr. Dunn: Well there are two objections, your Honor, the same one I made with respect to—I am satisfied that you will overrule, but [348] the same one I made with respect to Exhibit 7 and also, here, this man's signature hasn't been identified. The only thing we know is that he said he got it at his office.

The Court: It purports to be a reply to a letter addressed to the prime contractor. Is that what counsel has said?

Mr. Nesbett: Maybe, I didn't hear you, your Honor?

The Court: I say, it purports to be a reply from the prime contractors?

(Testimony of Thomas K. Downs.)

Mr. Nesbett: Yes.

The Court: To the letter that was addressed to them on June 16; this is July 28.

Mr. Dunn: That is just the point, your Honor, without some further identification that is all it does; it just purports to be.

The Court: It purports to be doesn't make it competent; now, I don't know——

Mr. Dunn: All right, sir.

The Court: It may appear later on that it is irrelevant and immaterial, and if so, why you can move to strike it out.

Mr. Dunn: It may be a forgery, your Honor, but his client would know. [349]

The Court: Yes, if it purports to be a reply from the prime contractor that would be sufficient.

Mr. Nesbett: I would like to read Exhibit 8, your Honor. "Williams Brothers Company," letterhead, "Engineers, Constructors, General Office, National Bank of Tulsa Building." Attached to it is a reference to a bond number and a statement with a copy of the letter written to Carl E. Oaks, by Williams Brothers, and it's dated July 28, which is on Williams Brothers letterhead, dated, however, "July 28, 1954, at Tok Junction, Alaska, addressed to Mr. Carl E. Oaks, Oaks Construction Company, P. O. Box 1452, Anchorage, Alaska, subject: Stuart E. Tope, d/b/a Stuart Construction Company"——

Mr. Dunn: Your Honor, how many letters has he offered in evidence?

The Court: He offered that letter and attach-

(Testimony of Thomas K. Downs.)

ment, and this one apparently is very competent, because it was addressed to Mr. Oaks.

Mr. Dunn: Well, I don't even know which one it is; this is a new one.

Mr. Nesbett: I handed it to counsel; [350] I thought he looked at it.

Mr. Dunn: You were talking about the one letter from Williams Brothers-McLaughlin?

Mr. Nesbett: They're all stapled together.

The Court: As I understand, it was an exhibit to the reply to the letter of June 16?

Mr. Nesbett: Yes, sir.

Mr. Dunn: No further objections that I haven't already made to the original, your Honor, and the original is already in, so——

The Court: Very well.

Mr. Nesbett: (Reading Exhibit 8.)

“Dear Mr. Oaks:

“Reference is made to our letter of June 11th, your reply of June 23rd and several conversations with you and Mr. Hancock regarding the unsettled accounts and obligations of Stuart Tope and/or Stuart Construction Company in connection with his operation for clearing the right of way under our contract with the Corps of Engineers.

“We have been informed that some of the obligations, referring to board and lodging that were listed in our letter of June 11th, have been paid; but, also, we have been informed that others listed

(Testimony of Thomas K. Downs.)

have not been paid and we have been advised of revised and additional amounts of these existing [351] obligations. As Mr. Barnes told you, we recognize your right to determine the correctness of these charges as a liability under our contract, but that since they have been reported to us as unsettled liabilities to the contract we are obligated to record them and report them to your bonding company.

“We have been informed of the revised and additional amounts of these obligations and the revised list of them, according to our present information, is as follows: Northern Commercial Company, rental on three tractors and one truck, and repair parts: \$22,865.97; McLaughlin, Inc., rental on three tractors, repairs and hauling: \$10,030.12; Babler-Rogers, rental on one tractor: \$2,000.00; Franklin Mining Co., (Howard Bayless) fuel oil and lubricants: \$3,000.00; C. A. Bicknell, welding: \$198.75; Art Sills, hauling tractors: \$425.00; Tommy Hyatt, rental of tanker: \$525.00; Yukon Equipment Co., repair parts: \$600.00; Post’s Service, repairs: \$146.12; Forty Mile Roadhouse, repairs: \$419.81; Tok Lodge, storage and repair parts: \$660.77. Total amount, \$40,871.54.

“As we have previously mentioned, we have not attempted to verify the correctness of these obligations, but they have been reported to us as unsettled obligations under the right of way clearing contract in connection with our Contract DA-95-507-eng-573 with the Corps of Engineers. [352] Your bond to

(Testimony of Thomas K. Downs.)

Williams Brothers Company under this contract is American Automobile Insurance Company Bond Number S 4634222. By copy of this letter we are informing them of this matter at their office at 364 Stuart Building, Seattle, Washington."

"Very truly yours,

WILLIAMS BROTHERS
COMPANY,

By ROBERT H. KERR,
Office Manager.

RHK:agb

cc: American Automobile Insurance Company,
Seattle, Washington.
Williams Brothers Company,
Tulsa, Oklahoma.
Travelers Insurance Company.
Northern Commercial Company,
Fairbanks, Alaska." [353]

Q. (By Mr. Nesbett): Now, Mr. Downs, did you address any communications to Mr. Oaks, in connection with Northern Commercial Company's predicament or payments on these rental options to purchase contracts?

A. I believe in April, 1954, we wrote a letter to Mr. Oaks, making formal demand upon him for the payment for the assignment which we had received from him.

Q. And did you ever, subsequent to that demand, make any other demand on him?

(Testimony of Thomas K. Downs.)

A. I don't believe we did directly, our attorney, I believe, did in Fairbanks.

Q. And who is your attorney in Fairbanks?

A. The firm of Collins and Clasby, Mr. Charles Clasby.

Q. And was he instructed to make a demand on Oaks Construction Company?

A. Yes, I believe he was.

Q. Well now, Mr. Downs, have you at my request calculated the total amount of monies called for under these five rental options to purchase contracts, which are Exhibit 4?

A. I don't know if you directly requested me to do so, but it has been done.

Mr. Dunn: Your Honor, I don't care, [354] I don't think it makes any difference but I don't see the relevancy.

The Court: Well, apparently it is competent, because under this rental contract by assignment, I understood Mr. Oaks assumed some liability on those.

Mr. Dunn: But the N. C. Company isn't suing Mr. Oaks?

The Court: I understand that, but it is all mixed up with this settlement and it all refers to the obligations under the assignments. The assignments have been offered here in evidence.

Mr. Dunn: Now, if he limited his question to the monies that were due, during the period of the pipeline work, I agree.

The Court: The question was, what obligations

(Testimony of Thomas K. Downs.)

has Mr. Oaks assumed under these four contracts of this equipment.

Mr. Dunn: I didn't understand that; I thought he wanted to know the total amount of monies due under the purchase agreement; I think it should be tied to this particular job before it has any relevancy.

The Court: Of course, the assignment [355] only appertains to this job, Mr. Oaks assumes the liability on this job in connection with Mr. Tope, and that is exactly what I understood counsel asked the witness.

Mr. Nesbett: Yes.

Q. (By Mr. Nesbett): Mr. Downs, approximately what was the total called for to be paid under those five rental options to purchase contracts?

Mr. Dunn: Now, the same objection, your Honor, the total amount called to be paid under those contracts, without limit. Now, it should be limited to this job.

The Court: Let him tell that and on cross examination you can have him limited on this job, if it goes beyond the job.

A. Well, the only answer I could give would be relative to the pipeline job. That was approximately \$22,800, and something, some odd dollars, I don't know.

Mr. Nesbett: Your Honor, all I asked him to do was give an approximate total of the amount called for to be paid in each of the five exhibits, which are

(Testimony of Thomas K. Downs.)

in Exhibit 4. Now, they have been admitted as exhibits, the Court [356] has every right to know the total and how much was paid on them.

The Court: And I have so ruled.

Mr. Nesbett: I just can't conceive counsel objecting on the grounds of relevancy, considering all the——

The Court: I have overruled the objection.

Q. (By Mr. Nesbett): What was the total amount called for to be paid under the five option to purchase agreements?

A. The best answer I could give——

Q. If the option to purchase was exercised, how much would have to be paid to Northern Commercial Company?

A. I didn't understand the question.

Mr. Dunn: Even if counsel can't understand it, I am going to make objection again. Now, the witness has just testified that the only information——

The Court: Well, just tell me right quickly what your objection is?

Mr. Dunn: My objection is that his question goes beyond the scope of this particular project. [357]

The Court: Well, apparently the last question does, but if it does, why then we will limit it to this project. Let him answer and then we will get down to this project.

A. Would you ask that question again, please?

Q. What was the total cost—what was the—how

(Testimony of Thomas K. Downs.)

much was to be paid under all of those five contracts, if the option to purchase was exercised?

Mr. Dunn: Same objection.

The Court: Well, objection overruled at this time. Let him answer and then let's get along.

A. I will have to look at the contracts to see.

Q. Didn't you calculate it in my office this morning at my request?

A. No, I think you calculated it, if I am not mistaken.

Q. Do you know how much was paid as rental to Northern Commercial Company on those contracts?

A. Yes.

Q. What amount?

A. \$8600.00, as I recall, approximately.

Q. Now, Mr. Downs, were you involved in attempting to arrange any meeting in Fairbanks between Oaks Construction Company and Stuart E. Tope, in order to iron out the differences in [358] connection with what was due, under this pipeline clearing dispute?

A. Yes, I was.

Q. Was any agreement, tentatively any meeting date set up?

A. Yes, a meeting date was tentatively set up.

Q. During what month of what year?

A. As I recall, it was in July or possibly August, of 1954; I don't remember the exact month.

Q. And was Mr. Oaks or Oaks Construction Company advised of the date?

A. Yes, they were.

Q. Was Mr. Tope advised of the date?

(Testimony of Thomas K. Downs.)

A. Yes.

Q. Did both of those parties show up for the meeting? A. No.

Q. Tell the Court what happened on the day that the meeting was supposed to have been held?

A. On the day the meeting was supposed to have been held, Mr. Tope appeared at the proper time and place, but nobody appeared for the Oaks Construction Company.

Q. Did anyone ever appear on behalf of the Oaks Construction Company?

A. Yes, Mr. Hancock appeared for the Oaks Construction [359] Company the day before the meeting was to be scheduled.

Q. And did Mr. Hancock know of the date the meeting was actually scheduled to be held?

A. Yes, I think he knew.

Q. Did Mr.—who was Mr. Hancock?

A. Mr. Hancock, as I understood it, was office manager and accountant for the Oaks Construction Company.

Q. Did Mr. Hancock tell you why he would not attend that meeting that was to be held the following day? A. Yes.

Q. And what did he say?

A. He said that he was not interested in meeting with Mr. Tope, and that Mr. Oaks was not interested in meeting with Mr. Tope, and they didn't see why it was necessary to have a meeting at all.

(Testimony of Thomas K. Downs.)

Mr. Dunn: Will you read the last part of that answer back?

(The Reporter read the last answer.)

Q. (By Mr. Nesbett): Was any meeting ever held between Oaks Construction Company and Northern Commercial [360] Company?

A. Not to my knowledge.

Q. Now, Mr. Downs was—I believe you testified that you believe five thousand dollars was received by Northern Commercial Company by reason of that assignment from Stuart Construction Company?

A. As I understand it, that's right.

Q. Now, do you know the circumstances of the receipt of that money? A. Yes.

Q. What are they?

A. After it was established that we had \$22,800, and some odd dollars coming, that is, established as far as we were concerned on account of the rental of this equipment, because of the apparent dispute between Mr. Tope and Mr. Oaks, a man from our Seattle office, by the name of Mr. Truman Sage, appeared in Fairbanks and negotiated a settlement with Mr. Carl Oaks in the office next to mine; and the basis of the settlement was the complete payment for the caterpillar parts furnished and one-half the rentals that were accrued, which amounted to ten thousand and some odd dollars. And on that, [361] I understand that Mr. Oaks has paid five thousand dollars.

Q. Now, do you have a copy of the settlement as it finally took place, took form?

(Testimony of Thomas K. Downs.)

A. Yes, I have.

Q. And will you produce a copy, please?

A. Yes.

The Court: Very well, we will take a recess.
Court will stand in recess for ten minutes.

(At 3:10 p.m. the Court took a ten minute recess.)

After Recess

The Court: You may proceed.

Q. (By Mr. Nesbett): Mr. Downs, did you find the written copy of the settlement that you were discussing before the recess?

A. Yes, I did.

Q. And do you have it there? A. Yes.

Q. What is the date on that settlement?

A. October 4, 1954.

Q. And is it signed by any persons?

A. It is signed by Truman Sage for the Northern Commercial Company, and Carl E. Oaks of the [362] Oaks Construction Company.

Q. And is there anything else attached to it?

A. A letter of transmittal from the Oaks Construction Company.

Q. Your Honor, we offer this in evidence.

Mr. Dunn: I have seen it, Mr. Nesbett.

The Clerk: Plaintiff's Exhibit 9.

The Court: Do you want that marked as one exhibit?

Mr. Nesbett: Yes. Your Honor, I would like to read Exhibit 9.

The Court: Very well.

(Testimony of Thomas K. Downs.)

Mr. Nesbett: (Reading Exhibit 9:)

“Northern Commercial Company, Alaska’s Pioneer Merchants, Executive offices—Colman Building, Seattle 4, Washington, Branch—Fairbanks.”

Date: “October 4, 1954

Mr. Carl Oaks

Oaks Construction Company

Anchorage, Alaska

Gentlemen:

“Confirming our conversation today we agree to a compromise settlement of one-half the rental prior to April 15, 1954, and the full open account which on June 15 amounted to \$5,465.97. Thus the June 15 statement is revised to the following: [363]

D8 Serial No. 1H8977	\$ 3,500.00
D8 Serial No. 1H9172	3,990.00
D8 Serial No. 1H9091	1,600.00
Truck 2-Ton Dodge	1,575.00

Rentals	\$10,665.00
1/2 Settlement	5,332.50
Open Account—June 15	5,465.97

Total\$10,798.47

“Yours very truly,

NORTHERN COMMERCIAL
COMPANY,

Truman Sage,

Caterpillar Department.”

(Testimony of Thomas K. Downs.)

“If this is in agreement with our conversation, will you please sign the acknowledgement.”

Signed: “Carl E. Oaks

Oaks Construction Company, by
Carl Oaks.” [364]

Q. (By Mr. Nesbett): Now, Mr. Downs, will you explain to the Court briefly how the total rental charges set out there by Northern Commercial Company were arrived at?

A. I couldn't say how they were arrived at.

Q. Do you know whether or not those rental charges that are mentioned in that settlement as constituting a certain amount were the rentals claimed to be due by Northern Commercial Company on the rental option to purchase contracts, which you have looked at and which you have before you, for the months used on the pipeline job?

A. Yes.

Q. Wasn't that the criteria used? A. Yes.

Q. Will you explain it to the Court, if it wasn't explained by now of what I fully said?

A. I don't understand.

Q. Do those rental options to purchase contracts set out the monthly rental to be paid for the use of each piece of equipment? A. Yes, they do.

Q. Do those rental options to purchase contracts [365] state that no rental payments would be required from the month of November until the month of May of each year, if the equipment was not used at all?

(Testimony of Thomas K. Downs.)

A. I don't know if the rental agreements say that, but that was the understanding.

Q. Will you look at them and see?

A. Yes.

Q. And the payment schedule on each piece of—on the contract, as to each piece of equipment, doesn't it state that rentals will be deferred during—or rather between the months of November to May?

A. Yes, it does.

Q. Now, how did Northern Commercial Company then compute the rentals claimed to be due for use on this pipeline job? Did they arrive at a certain amount of number of months and use the rental purchased in the contract?

A. I don't know how they were computed; I didn't compute them.

Q. What are the total rentals required to be paid according to that settlement agreement?

A. One half of the total of it amounting to five thousand, three hundred, thirty-two dollars, [366] fifty cents.

Q. The total amount of rental that they started out with was what amount?

A. Ten thousand, six hundred sixty-five dollars.

Q. And that was the amount that Mr. Truman Sage of Northern Commercial Company thought was due for equipment for the months it was used on the pipeline, is that correct?

A. Yes.

The Court: Ten thousand, six hundred how much?

(Testimony of Thomas K. Downs.)

A. Ten thousand, six hundred sixty-five dollars even.

Q. And then does the agreement, as it indicates, show that they comprise it at one-half the amount of the rental?

A. The agreement shows that, yes.

Q. And now the parts, what amount was stated for the open account for parts?

A. Five thousand, four hundred sixty-five dollars and ninety-seven cents.

Q. Now, what parts does that figure cover? What were those parts used for?

A. For parts used for the maintenance of the three tractors and the power control unit that [367] we rented to Mr. Tope.

Q. Parts furnished during the time the equipment was being used on the clearing job?

A. Yes.

Q. Then, Mr. Sage and Oaks Construction Company, as is evidenced by that settlement agreement, took half the rental that was discussed between them and added it to the parts inventory charged against the equipment for that period of time and settled for that amount; is that correct?

A. That is correct.

Q. And that was in the total amount of what?

A. Ten thousand, seven hundred ninety-eight dollars and forty-seven cents.

Q. Now, as credit manager of Northern Commercial Company, were you the person of that company primarily concerned with collecting on these

(Testimony of Thomas K. Downs.)

rental options to purchase contracts of Stuart E. Tope? A. Yes, I was.

Q. All of those contracts were with Stuart E. Tope as an individual, were they not?

A. They were.

Q. Now, why is it you were not signatory to that— [368] to a settlement with Oaks Construction Company for the rentals?

A. Well, my understanding of the situation was that I was excused from the settlement because Mr. Oaks was indebted to the Northern Commercial in Anchorage in quite a substantial amount of money, and Mr. Sage, as head of the machinery department, did not want any court action to ensue because of this particular arrangement with our tractors in Fairbanks.

Q. Was Mr. Sage generally over all the machinery? A. Yes, he is.

Q. Then he took over the settlement account and you had nothing to do with it?

A. That is right.

Q. Do you know how much Mr. Oaks was indebted to the Northern Commercial Company?

A. No, I don't know.

Q. Do you know approximately?

Mr. Dunn: I object, your Honor, it can't be important.

The Court: No, it is not important here, as to what he may have owed, unless you can connect it up some way with the transaction of the plaintiff. [369]

(Testimony of Thomas K. Downs.)

Mr. Nesbett: I intend to do that, your Honor.

The Court: Very well, if you say you will, why we can disregard it if it isn't connected up.

Q. (By Mr. Nesbett): Do you know approximately how much Mr. Oaks, or rather Oaks Construction Company owed the Northern Commercial Company at that time?

A. I understood from conversations with our Anchorage people that it was somewhere around two hundred thousand dollars.

Q. Well, then, did you just testify that Mr. Sage took over so that the dispute between Northern Commercial Company with Oaks as to what might be due on the Tope work would not interfere then with the main account with Oaks Construction Company; is that correct? A. That is correct.

Q. Were you fairly familiar with Tope's business dealings prior to his going to work on this pipeline clearing work?

A. Not very familiar, no.

Q. Did you—you received the assignments that you mentioned as having been made from Tope to [370] Northern Commercial Company of monies due from Munter, didn't you? A. Yes.

Q. And you knew the status of his account, didn't you? A. Of Tope's account?

Q. Yes, and as of June when you were talking with Clasby, your attorney, and Tope, concerning notification of Oaks, you were attempting to work something out that would result in payment to your company, weren't you? A. Yes, I was.

(Testimony of Thomas K. Downs.)

Q. Did you yourself agree with this settlement that Truman Sage entered into here with Oaks Construction Company? A. No, I didn't.

Q. Why didn't you?

A. Because I didn't see why we weren't entitled to all our money.

Q. Did you tell Mr. Sage that?

A. I did.

Q. Then, is it your opinion—your statement that the true nature of the claim against Oaks concerning Tope's work was ignored in favor of the two hundred thousand dollar account that [371] Oaks owed your company in the Anchorage area?

Mr. Dunn: Now, your Honor, I object; he wanted the settlement in and he has got it in; now, he is trying to upset the——

The Court: Well, I think it is immaterial whether the witness agreed with it or not.

Mr. Nesbett: Very well, your Honor.

The Court: Settlement was made and that concludes the matter.

Q. (By Mr. Nesbett): Mr. Downs, what eventually happened to that equipment covered by the rental option to purchase contracts, Exhibit 4?

A. It was all returned to us.

Q. And roughly, over what period of time?

A. I think it—the first tractor was returned to us in February, because it broke down on the job; that was the one that required replacements of the engine, and the other two tractors and the power

(Testimony of Thomas K. Downs.)

control unit were all returned by October 1954, I believe; I am not sure.

Q. Did Mr. Tope ever exercise his option to purchase as to any of that equipment?

A. No. [372]

Q. Did he lose his right to exercise an option to purchase on that equipment?

A. Yes, he did.

Mr. Dunn: This is the type of thing that I warned about at the beginning of the trial; it is immaterial; I move to strike it. This is a suit for monies earned, if not a suit for damages other than that.

The Court: Yes, you are right about that.

Mr. Nesbett: Your Honor, my contention is that Mr. Tope has lost doubly by reason of being unable to collect the time——

The Court: Of course, we are confined by the averments of his complaint here.

Mr. Nesbett: I didn't understand that, because generally it has been conceded up here that the judge would try the case strictly on the issues as they found them after the case unfolded itself.

The Court: Well now, if that is true, where no objection is made to the testimony, the Court will try it upon the issues as made by the evidence, not by the pleadings, but where counsel exercises the [373] right to limit the testimony to the pleadings, why then the Court is bound by the pleadings. And I understand counsel has made objection on the grounds that it is beyond the pleadings in the

(Testimony of Thomas K. Downs.)

case. Now, if the testimony should go beyond the pleadings, then it is the right of the parties to amend the pleadings, in order to conform to the proof.

Mr. Nesbett: I have no other questions, your Honor.

The Court: Any cross-examination?

Mr. Dunn: Yes, please.

Cross-Examination

By Mr. Dunn:

Q. Mr. Downs, you confuse me a bit, in connection with these monies that were paid. Did you testify on direct examination that it is your understanding that five thousand of the ten thousand odd dollars was paid?

A. I did testify to that.

Q. You mean—is that what somebody told you?

A. That is what somebody told me.

Q. Do you know whether or not the ten thousand dollars was paid?

A. No, I don't.

Q. And so as far as you are concerned, the full [374] monies may have been paid or they may not have been?

A. That's possible.

Q. May I have 7 and 8, please?

Mr. Downs, I read in part from Plaintiff's Exhibit 7: "Please note the last item on this statement is a charge for four thousand dollars for a used replacement engine for one of the rented tractors. The original engine was damaged beyond repair by the contractor while on the job." And then

(Testimony of Thomas K. Downs.)

it goes on—remember how it goes on, I assume, don't you? Now, what contract are you referring to?

A. Well, Mr. Stuart Tope.

Q. You are referring to Mr. Tope?

A. Yes.

Q. Do you know whether or not Stuart Tope ever got full credit for this ten thousand odd dollars that was negotiated in the course of this settlement, evidenced, I believe, by Plaintiff's Exhibit 9?

A. No, I don't.

Q. You do not? A. I do not.

Q. Now, I am asking you, you understand, whether [375] you know if he got full settlement, full credit for that settlement, not whether or not it was paid?

The Court: He says he don't know.

A. I didn't understand your question, would you ask me again?

Q. Do you know whether or not Stuart Tope got full credit for ten thousand dollars, ten thousand odd dollar figure, set forth in the settlement? Now, by full credit I mean according to the records of the N. C. Company, was Stuart Tope indebted some ten thousand dollars less after this settlement than before? A. Yes.

Q. So he did get full credit according to the N. C. Company? A. Yes, he would.

Q. Irrespective of whether or not it was paid?

A. Right.

Q. Let me see 9 and 4, please.

(Testimony of Thomas K. Downs.)

The Clerk: I believe 9 is over there. (Indicating the witness stand.)

Q. Mr. Downs, do you know whether or not these rental purchase agreements, Plaintiff's Exhibit 4, are all the same; are they the same [376] form, do you know? A. I don't know for sure.

Q. And——

The Court: Didn't you examine those at some time to see if they were all the same? Can't you examine those during the adjournment to find out if they are all the same. He says he doesn't know.

Q. Yes, I just wondered if he will still be on the stand; that was the only thing, if I can recall him for that point?

The Court: No, no, it would be better to examine him now and examine them. If there is anything you can ask him, he says he doesn't know whether they're all the same; you can examine him on what he does know.

Q. Do you recall Mr. Nesbett questioning you with respect to the waiver of payment during the months of November and April?

A. I recall him asking me that.

Q. Now, I call your attention to Plaintiff's Exhibits 4-3, 4-4, and 4-5, and ask you, first, if those are not concerned with the three cats that Mr. Tope got from the Northern Commercial Company? [377]

A. Yes.

Q. Now, I also ask you if in each of those there is not some provision for waiver of rental payment?

A. There is a statement here and it says that

(Testimony of Thomas K. Downs.)

on the assumption that the property will not be used during the months of November, 1953, through April, 1954, rental payments will be passed during these months and become due and payable again on June 1, 1954, and the first day of each and every——

Q. Now, that is from November of '53 to May of '54, was it? A. April of '54.

Q. Now, it is only for those months, is it not?

A. That's right.

Q. Now, is it waived or merely held in abeyance?

A. It is waived on the assumption that the property will not be used.

Q. Is it waived or held in abeyance; doesn't that say it will become due in June?

A. It is intended to mean waived, while the property was not being used; it was intended that no rental would be charged.

Q. That is your understanding of it, the agreement? [378]

A. That is the understanding of the agreement.

Q. Well, is that what the agreement said?

A. That is what I interpreted it to state.

The Court: That is what it says.

Mr. Dunn: It will speak for itself, your Honor.

The Court: Yes, I understand this equipment was used during those months.

Q. (By Mr. Dunn): Well, I take it a default did occur under each of those agreements, did it not? A. Yes.

Q. Was any payment made on those agreements

(Testimony of Thomas K. Downs.)

prior to November of 1953? A. Yes.

Q. Were they current in November of 1953?

A. I couldn't say that. I don't know.

Q. Have—do you have your records with you?

A. I don't believe I have the records with me, no. I wasn't asked to bring them down.

Q. Now, this settlement agreement, Mr. Downs, in the course of that, N. C. Company was to receive payment for the full open account of Mr. Tope, isn't that right? A. Yes, that's right. [379]

Q. Do you know over what period of time that account covered, Mr. Downs?

A. Not precisely.

Q. When did it begin?

A. I would say it began about the middle of December or the first of January and ran until——

Q. Of what year?

A. 1953, and ran until the date stated in the agreement.

Q. About the middle of December, 1953?

A. Or the first of January, 1954.

Q. And ran through June 15, is that correct?

A. If that is what it says in the agreement.

Q. Well, how do you know that this open account is for only items used on the pipeline job?

A. Because I don't believe Mr. Tope was engaged in any other enterprise at the time; and they were for caterpillar parts, which we knew from numbers of the parts, were going into the tractors, to the same model we had rented, and inasmuch as

(Testimony of Thomas K. Downs.)

he had no tractors at that time, we logically assumed it was for those tractors.

Q. It is an assumption then, isn't it?

A. Certainly, unless you see the part actually go into the machine, you don't know. [380]

Q. Well, actually during that period of time, from mid-December of '53 through June 15 of '54, how many times did you see Mr. Tope?

A. Several times, I don't recall how many.

Q. But you weren't with him the bulk of that time, were you, by any chance? A. No.

Q. Do you really know what he was doing all of that time?

A. I thought I knew; I assumed I knew.

Q. Because of what he told you?

A. Not only what he told me, but what we understood from our own service men and——

Q. What other people told you, then?

A. That is right.

Q. Now, after this settlement was made, Mr. Downs, did Mr. Tope, according to the Northern Commercial Company's books, still owe the balance of the money on which the settlement was based?

A. Yes.

Q. Well—which is more accurate, then, was this a settlement of Oaks' account or was it a payment by Oaks so that N. C. Company wouldn't move against this particular job or the bonds [381] on it?

A. I don't understand your question.

Q. Well, after the settlement, the balance of the

(Testimony of Thomas K. Downs.)

monies, you testified, didn't you, were still owed by Tope? A. Yes.

Q. Then was this settlement, can this settlement rightly be termed a settlement of Mr. Tope's account or is it more aptly termed a payment by Oaks, or an agreement made by Oaks to induce the N. C. Company not to make any claim against this pipeline job?

A. I couldn't say that; I didn't make the settlement.

Q. But at any rate, Tope still owes the balance of the money? A. That is right.

Q. Now, about this meeting that you testified about, to be held in Fairbanks, in July or August of 1954, you spoke of that meeting being set up, did you not? A. Yes.

Q. What do mean by its being set up; I don't understand?

A. An agreement was made, or an arrangement was made as to a specific time and place with the [382] Oaks Construction Company and Mr. Stuart Tope, and they were both notified and we understood that they both understood that they were supposed to be, and agreed to be, at the place and time agreed upon.

Q. Who notified these people to that effect?

A. I don't recall that.

Q. How do you know they agreed to it?

A. Because Mr. Hancock showed up the day before and mentioned the fact that he wasn't going,

(Testimony of Thomas K. Downs.)

they weren't going to show up for the meeting, or he indicated that in his conversation.

Q. But you don't know who notified them?

A. No, I don't know who notified them.

Q. The only reason you know that it was set up was because Hancock came up there a day early?

A. No, that was not the only reason, because Mr. Hancock, as I just stated, alluded to the fact that he understood the meeting was to be held the next day, but they weren't interested in meeting with Mr. Tope.

Q. He said further that they didn't see that they had to talk to Mr. Tope about anything, is that right?

A. Words to that effect. [383]

Q. Now, Mr. Downs, is it not true, that due to the representation of Tope, you believed as late as April 15, 1954, that Mr. Tope was working under a contract on this pipeline job?

A. Would you repeat that question, please?

Q. Will you read the question back to him, please?

(The reporter read the last question.)

A. Yes, I understood it was under the contract, yes.

Q. That was due to his representation, was it not? As a matter of fact, he even assigned the contract to you, hadn't he?

A. He had.

Q. And wasn't it due to his representation?

A. Mr. Tope's; I don't understand what you mean?

(Testimony of Thomas K. Downs.)

Q. Didn't you believe that Tope was working on this job under a contract, because of what Tope told you?

A. Not only because of what Tope told me, but because of the contract he showed me.

Q. I see, Well, did Tope refute or deny that he was working on the job under a contract?

A. I don't recall.

Q. Quite the contrary, your recollection is, is it not?

A. No, well, no, I couldn't recall that either; I [384] couldn't and wouldn't say one way or the other.

Q. But he showed you the contract?

A. Before the job started, he did.

Q. And as late as April 16, 1954, you thought he was working under a contract on this job, did you not? A. Yes, I could say that.

Q. As a matter of fact, did you not—maybe this is already in—did you not on April 16, 1954, send this letter to Oaks Construction Company?

A. Yes, I wrote the letter.

Q. Demanding payment under the contract of Stuart Construction Company?

A. Demanding payment under the assignment of the contract.

Q. Yes.

Mr. Nesbett: I have no objection to it being admitted, Your Honor.

Mr. Dunn: I offer it, please.

The Clerk: Defendant's Exhibit K.

(Testimony of Thomas K. Downs.)

Mr. Dunn: I would like to read it, please.

The Court: Very well.

Mr. Dunn: It is addressed to Oaks Construction Company, Box 1452, Anchorage. [385]

“Fairbanks, Alaska,
April 16, 1954,

“Attention: Mr. C. E. Oaks,

“Gentlemen:

“According to assignment by Stuart Construction Company, Inc., to us, accepted by you December 2, 1953, all gross earnings by Stuart Construction Company, Inc., in connection with pipeline clearing, are to be paid to us.

“Demand is hereby made upon you for payment at once in accordance with assignment for all gross earnings by Stuart Construction Company, Inc.

“Your prompt co-operation in this matter will be appreciated.”

“Sincerely yours,

“NORTHERN COMMERCIAL
CO.

“T. K. DOWNS,

“Credit Manager.

“TKD:s

“cc: CDF

Tope.” [386]

Q. (By Mr. Dunn): Now, Mr. Downs, did you get a reply to that letter? A. Yes, I did.

(Testimony of Thomas K. Downs.)

Q. Do you remember what they told you, what Oaks said?

A. Yes, I think so, in substance anyway.

Q. What is it, as best you recall?

A. As best I recall, they took issue with me over the word "gross."

Q. Did they say anything about not owing any money, that as a matter of fact, there was a substantial over-payment on that contract?

A. I don't know as they said anything about an over-payment; they said the Stuart Construction Company owed them some money.

Q. Said, "they owed them some money?"

A. Yes.

Q. How many times have you been down here to Anchorage, Mr. Downs, as a result of this lawsuit?

A. Twice previously.

Q. Twice previously? A. Yes.

Q. So this is you third trip?

A. Yes. [387]

Q. Who has been bearing the expenses of those trips, Mr. Downs?

A. Mr. Tope.

Q. Mr. Tope himself? A. Yes.

Q. Has he actually paid for them?

A. I don't understand what you mean by "paid for them."

Q. Well, the way you buy your lunch, do you pay for it? Has Mr. Tope actually paid for your three trips here to Anchorage?

A. Yes.

Q. Now, the first one, did he pay for it when you made it?

(Testimony of Thomas K. Downs.)

A. I don't get—I don't understand what you mean.

Q. Isn't it true that on your first trip you drew money from N. C. Company and charged Tope's account for it?

Mr. Nesbett: I'll object, your Honor, on the ground it is completely irrelevant.

The Court: Well, he had a right to ask the witness the question bearing on his credibility, that is——

Mr. Dunn: I don't doubt Mr. Downs' credibility, your Honor; I don't want to give [388] that impression.

The Court: Well, he is interested in the case then, and that always affects credibility.

Mr. Dunn: Well, that is true.

Q. (By Mr. Dunn): Isn't it true, that the first trip, you withdrew, rightly, with full authority, monies from the N. C. Company, paid your own way down here and charged Mr. Tope's account?

A. That is correct.

Q. That is correct, isn't it? A. Yes.

Q. Now, is it not also true that one of the things that encouraged you to extend credit to Tope was the contract he had on this pipeline?

A. Well, yes, that was the main encouragement.

Q. And——

A. That and the assignment.

Q. And you saw the contract, you said too, didn't you?

(Testimony of Thomas K. Downs.)

A. Yes, I saw a contract which he showed me as being the one he was about to engage in.

Q. Well now, if Mr. Tope made a contract in the name of Stuart Construction Company and assigned [389] it to you to get credit, and then turned around and did the work as an individual, would you consider that a break of faith?

A. Why, I never thought about it one way or the other.

Q. Would you, instead of doing it in the name of the contracting party, the corporation, to do it as an individual, think he had pulled a trick like that on you?

A. I don't know; I never thought about it.

Q. Well, do you think he would do that?

A. I don't understand what your question is.

Q. Do you think Mr. Tope would make a contract on behalf of a corporation that he controlled and assign the proceeds of it to you and then turn around and do the work as an individual and not as a corporation?

A. I don't think so.

Q. You don't think he would do that?

A. I don't think so.

Q. Would that affect his credit standing with you, if he did it?

A. I don't know what particular purpose he would have in mind; that would make quite a difference as to our view of the credit risk. [390]

Q. Is Northern Commercial still extending credit to Mr. Tope?

A. Yes.

Q. Do you recall when rental was last charged

(Testimony of Thomas K. Downs.)

for these three cats? A. I don't recall, no.

Q. Do you have the deposition files there, the second one of Mr. Downs, please. (Handed to him by the Clerk.) Mr. Downs, I hand you this instrument and ask you if that is your deposition given in this matter on July 29, 1958?

A. Yes, it appears to be.

The Court: July 29, did you say?

Q. Yes, of this year. Now, Mr. Downs, did you receive a subpoena for the taking of that deposition? A. Yes, I did.

Q. And according to the subpoena, where was the deposition to be taken?

A. In the law offices of Robert Parrish of Fairbanks.

Q. And where do you live?

A. In Fairbanks.

Q. Wouldn't it have been more—where was it actually taken? A. In Anchorage. [391]

Q. Wouldn't it have been more convenient for you to have had it taken in Fairbanks?

A. As far as time goes, yes.

Q. Oh, why did you come down here?

A. Because I contacted Tope and told him I had been served with a subpoena and I got a call later from Mr. Nesbett asking for the deposition to be taken down here.

Q. And you complied with that request?

A. Yes.

The Court: Is there any defect in the notice in the place where it was taken?

(Testimony of Thomas K. Downs.)

Mr. Dunn: No, sir, this is merely to, again, show the witness' willingness to cooperate with this plaintiff; that is the only point.

Q. (By Mr. Dunn): Now, I invite your attention, Mr. Downs, to page 20 of your deposition, particularly to line 8, and ask you whether or not at the time this deposition of July 29, 1958, was taken, in answer to the question which now follows: "Then I will repeat my question, when was the last rent—last date rental was charged for the equipment set forth in Exhibit 4?" [392] And you answered, "There is a notation on one invoice to the effect that Tractor Serial No. 1H8977 was returned on November 18, 1954, with the angle dozer still to come. There is a notation on another invoice to the effect that Tractor Serial No. 1H9172 was returned to Fairbanks on February 17, 1955. The last date rental was charged on the third tractor, Serial No. 1H9091, was February 27, 1954." Did you so testify?

A. I did.

Q. Now, at that time did you have the necessary records available to you? A. Yes, I did.

Q. Do you believe that testimony is accurate then? A. Yes.

Q. No further questions.

The Court: Any further redirect?

Mr. Nesbett: Your Honor, a question or two.

(Testimony of Thomas K. Downs.)

Redirect Examination

By Mr. Nesbett:

Q. When you testified, Mr. Downs, that you were induced or even encouraged to extend credit to Mr. Tope, because of the contract, what type of [393] merchandise, or for what type of credit were you speaking of when you said you were willing to extend him credit based on the contract?

A. I was referring to the tractor rentals.

Q. Now, those tractors, those caterpillars were sold to Mr. Tope, weren't they, according to Exhibit G, during June, July and August of 1953?

A. About that time.

Q. Well then, when you mentioned the assignments, were you referring to the assignments for income from Munter Construction Company?

A. Yes, I was referring to those and also later assignments of Oaks Construction Company in December.

Q. Well, now, as a matter of fact, when you received the assignment which is in evidence as Exhibit D, dated December 2, 1953, did you think there was a contract in existence at that time?

A. A contract between whom?

Q. Stuart Construction Company and Oaks.

A. Yes, I did.

Q. Did you know that that contract—when did you see that contract?

A. Oh, sometime in December; early—the first

(Testimony of Thomas K. Downs.)

few [394] days of December; I don't remember which date.

Q. If I told you that that contract, according to the copy that we have in evidence, apparently was not signed until December 17, 1953, would you still feel that you had seen a copy of the contract when the assignment was executed on December 2, of 1953?

A. Yes, I am sure I would have seen it.

Q. Did you discuss the contract with Tope? The fact that he might get a contract with Oaks for the clearance work?

A. I don't recall ever discussing the contract with him before I actually saw it.

Q. Did you see a copy of the contract?

A. Yes.

Q. Now, he had already purchased his caterpillars?

A. Yes, he had.

Q. He had—you had already been paid by virtue of two other assignments, approximately \$8500.00 rental, hadn't you?

A. Yes, we had.

Q. Then you weren't encouraged to extend him credit in connection with the rental option to purchase agreements, because of any pipeline contracts in the offing, were you? [395]

A. No. I don't quite understand what you mean.

Mr. Dunn: Your Honor, the witness has already answered that.

The Court: I thought he had; if you want to clarify it, why you have a right to do it.

(Testimony of Thomas K. Downs.)

Q. (By Mr. Nesbett): Now, your deposition has been taken twice in this case, has it not?

A. Yes, that is right.

Q. You have made all the records of the Northern Commercial Company pertaining to this Oaks-Stuart Construction Company, Stuart E. Tope matter available to Mr. Dunn?

A. I gave him everything that he asked for.

Q. Now, on this occasion when you were subpoenaed for a deposition in Fairbanks and the deposition was later taken in my office, was it because I called you in Fairbanks and asked you if you would come down instead?

A. Well, yes, that was why I came down.

Q. Did I tell you why I didn't want to come to Fairbanks for the deposition?

A. Yes, you did.

Q. What did I give as a reason? [396]

A. You said you had a case coming up the following day for which you had laid the groundwork apparently sometime before, and you couldn't come up to Fairbanks and get back to Anchorage before my deposition was heard.

Mr. Dunn: Your Honor, I even stipulated to the change of places; I was merely trying to——

The Court: Yes, when we get into these things where there is no issue, it takes up a lot of time and we get nowhere. When it was over, I understand this deposition was taken and agreeable to everybody, and, of course, counsel said he wanted to show it in order to show the co-operative attitude of the witness; in view of that testimony,

(Testimony of Thomas K. Downs.)

Mr. Nesbett has a right to explain the circumstances under which he came.

Mr. Nesbett: I have no further questions, Your Honor.

The Court: Is that all now with this witness?

Mr. Dunn: Yes, sir.

The Court: Call the next witness.

Mr. Nesbett: May this witness be [397] excused to return to Fairbanks?

The Court: What do you say, Mr. Dunn?

Mr. Dunn: Your Honor—Mr. Downs, when would you want to leave, if you—

Mr. Downs: I would like to leave today if I could.

Mr. Dunn: Leave today?

Mr. Downs: If I could.

The Court: He has been quite thoroughly combed, I wonder what else you would want from him. However, that is for you to say, not for me.

Mr. Dunn: I think it will be all right.

The Court: He wants to know if he may be excused from further attendance in court, and counsel says it is all right, so it is all right with me, Mr. Downs.

Mr. Downs: Thank you, Your Honor.

Mr. Nesbett: On second thought, Your Honor, I will discuss it with Mr. Downs; I was going to say Mr. Oaks has not testified as a witness and it may very well be that I would want to keep Mr. Downs; I'll discuss it with him. [398]

The Court: Yes, that is a matter—

(Testimony of Thomas K. Downs.)

Mr. Dunn: Well, is he excused or not?

The Court: Well, apparently he is not.

Mr. Dunn: He is not, well all right.

The Court: I would have no authority to excuse him unless the parties to both sides say so.

Mr. Dunn: I just wanted to know, because it will probably affect what I do tonight.

The Court: And counsel for the plaintiff says he doesn't know if he is able to excuse him now.

Mr. Nesbett: Mr. Downs says that he will wait, Your Honor, until I can——

The Court: Very well, I will be here.

Mr. Nesbett: Your Honor, I would like to call Mr. Bayless at this time.

The Court: Very well.

(Whereupon, Mr. Downs was excused from the stand.)

JOHN HOWARD BAYLESS

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. Will you state your full name, Mr. Bayless? [399]

A. John Howard Bayless.

Q. Where do you live, Mr. Bayless?

A. Tok Junction, Alaska.

Q. Are you in business there? A. Yes.

(Testimony of John Howard Bayless.)

Q. What is your business?

A. Delivering oil up and down the highway.

Q. How long have you lived in Alaska?

A. Oh, about forty years.

Q. Are you the proprietor of the company known as the Franklin Mining Company?

A. Yes.

Q. And is that company a Standard Oil distributor for the Tok area? A. Yes.

Q. Do you know—you know Mr. Oaks and Mr. Tope, here, do you not? A. Yes.

Q. I'll ask you whether or not you had occasion to furnish fuel to the equipment being used on the Haynes pipeline clearing job in the Tok area, during the months of December, January, February, March, and April, that is, December of '53, and January, February, March, and April and May of '54? [400] A. Yes, I did.

Q. And was Mr., or rather, strike that. Did you furnish fuel for equipment operated in the clearance work from Tok to Big Delta? A. Yes.

Q. And who paid you for the fuel furnished?

A. Mr. Oaks.

Q. And was any arrangement made between you and Mr. Oaks as to who would pay for the fuel used by that machinery in that clearance work?

A. (Pause.)

Q. I will ask you this, did you understand the question?

A. Yes, but it wasn't just as you put it to me; I couldn't answer it the way you—

(Testimony of John Howard Bayless.)

Q. Well, did Mr. Oaks agree that he would pay for the fuel that was used by the equipment operating in that area to clear the pipeline right of way?

A. Mr. Oaks' partner done all the talking.

Q. All right, who was he?

A. Mr. Butcher.

Q. Mr. Owen Butcher? A. Yes.

Q. What did Mr. Butcher say to you in connection with [401] payment for the fuel used?

A. He asked me if I would furnish their subcontractors with fuel, and they would guarantee the oil and fuel bill.

Q. Well——

Mr. Dunn: Same objection to this as I made before; I made objection to Mr. Noonan, previously deceased partner, and Mr. Butcher is dead also.

The Court: Objection will be overruled.

Q. (By Mr. Nesbett): Mr. Bayless, did you—were you paid for all the fuel furnished for the equipment used in that area for clearance?

A. No, not all of it.

Q. And what portion of it were you not paid for?

A. Three thousand and twenty-nine dollars.

Q. And do you know who owned the equipment that consumed that fuel?

A. I suppose Mr. Tope owned the equipment.

Q. Were you living in the Tok area at the time the equipment was working in that area, clearing?

A. Yes.

Q. Was Mr. Tope in the area also?

A. Yes. [402]

(Testimony of John Howard Bayless.)

Q. And was it your understanding that the equipment belonged to Mr. Tope? A. Yes.

Q. And——

Mr. Dunn: Your Honor, I don't like this form of question, once understanding it gives——

The Court: No, on that question there is no question, no doubt here but Mr. Tope owned the equipment and it was subject to the rental rights of this company; now, everybody is agreed on that. Now then, the question was, did he understand that he did own the property; so if it were a matter of proof at the first instance, then your objection would be good, but since there is no question here but that Mr. Tope owned it, owned the property, now then, you ask the witness, in dealing with him if he understood that.

Q. (By Mr. Nesbett): Mr. Bayless, in furnishing fuel for equipment, engaged in the clearing in that area, did you have an occasion to go out on the job to deliver fuel? A. Yes. [403]

Q. And how frequently, for example, would you do that?

A. Well, it didn't happen too often, but one time there when the weather was real cold, the equipment that Mr. Tope had, they couldn't get started on account of the cold weather and he asked us to service the tractors that were sitting along the pipeline; that they wanted to keep them running so when the weather broke, they wouldn't lose a lot of time, and they would be ready to go.

(Testimony of John Howard Bayless.)

Q. Well, generally, how was the fuel delivered for use in the equipment?

A. When they could, they came to the tank farm and picked it up in a truck that had a five hundred gallon tank behind the cab and they hauled it themselves.

Q. Now, did you have an opportunity to observe Mr. Tope's activities in connection with that clearance project? A. Yes.

Q. Were there any other employees, or rather—I will strike that. Did you know a man named Warren Hager? A. Yes. [404]

Q. And do you know who employed him?

A. He was an engineer for Mr. Oaks, I believe.

Q. Was he working on the same area and same job as Mr. Tope? A. Yes.

Q. Now, were your opportunities to observe Mr. Tope's activities in the clearance project sufficient to enable you to state whether or not he had the authority, and acted with the authority that ordinarily goes with a subcontractor?

Mr. Dunn: Objection, your Honor, the witness—there is no proper foundation. The witness should testify as to what he has observed.

The Court: Counsel asked what he did observe, at least, you could bring that out on cross-examination; he says he was familiar with Mr. Tope and some of his activities there. But ask him what he observed, then there will be no objection.

Q. (By Mr. Nesbett): I asked you if you had observed enough to be able to answer that question.

(Testimony of John Howard Bayless.)

Now, I will ask you: Did the Tope—or rather the men engaged [405] in the clearance project live in the Tok Lodge? A. Yes.

Q. Did you have occasion to go there of an evening and on other occasions too, when those men would be there? A. Yes.

Q. And did you have occasion to go out on the clearance project on at least a few occasions?

A. Yes.

Q. Did you know a Mr. Roy Crawford?

A. Yes.

Q. Was he in the Tok area on occasions?

A. Yes.

Q. Was he employed by Mr. Oaks?

A. Yes.

Q. Now, was your observation of those gentlemen and Mr. Tope—I am speaking of Crawford, Hager, and Tope, sufficient to be able to permit you to answer the question: Did Mr. Tope carry on his activities in connection with that clearance project as a subcontractor ordinarily would, with the authority of a subcontractor?

Mr. Dunn: Objection, improper foundation.

The Court: I will leave it for cross-examination; just request what observations he made.

Q. (By Mr. Nesbett): Was Mr. Tope running that clearing job?

Mr. Dunn: Same objection.

The Court: Objection overruled at this time.

Q. (By Mr. Nesbett): You may answer that if you can.

(Testimony of John Howard Bayless.)

A. Seemed to me that Mr. Hager and Mr. Crawford were running the job.

Q. Did you observe what activities Mr. Tope was engaged in, generally?

A. What I saw of Mr. Tope, he was driving a fuel truck and working on the tractors and rustling whatever was needed for the job.

Q. Now, are you familiar with an area of land somewhere near Tok, Alaska, called Cathedral Bluff?

The Court: Called what?

Q. Cathedral Bluff.

The Court: Yes, I remember that.

A. Yes.

Q. Do you recall the pipeline clearance work progressing to and through the area identified as Cathedral [407] Bluff? A. Yes.

Q. Do you yourself know of any difficulties encountered with respect to right of way clearance in that area?

A. Yes, it was hard work and a lot of big boulders and a lot of rock.

Q. Do you know of any difficulties encountered in connection with the right of way clearance because of those facts?

A. Well, it was hard for a tractor to work without being broken down. They wouldn't be able to see these obstacles and they would hit them and break the dozer arms and break—a lot of breakage on account of cold weather and snow, and that is what I would call roughing it.

(Testimony of John Howard Bayless.)

Q. Do you recall, generally, the temperature range in that area during the months of January and February of 1954?

Mr. Dunn: We will stipulate to it, your Honor.

The Court: That it was very cold?

Mr. Dunn: Yes, forty to sixty below; is that all right? [408]

Mr. Nesbett: Sixty-seven on one occasion, will you stipulate to that?

Mr. Dunn: Sure.

Q. (By Mr. Nesbett): Is the metal breakage high when operating in temperatures of that range, Mr. Bayless? A. Yes.

Q. Was it high on that particular clearance project? A. I think very high.

Q. Were you ever present in the Tok Lodge to overhear a conversation between Mr. Tope and Mr. Crawford in connection with moving the entire spread out of Cathedral Bluffs and over to Big Delta, until the weather moderated? A. Yes.

Q. Do you recall approximately when that conversation occurred, that is, with respect to, say the time the clearance work commenced?

A. No, I couldn't give the exact date, but it was during this cold weather when they weren't working that they would be in conference about trying to make more headway and get more done. Then Tope thought if he could move to Big Delta and work back this way, he would be out of the [409] cold; it wasn't as cold down that way and it would be a lot easier going; he could get a lot more done if he

(Testimony of John Howard Bayless.)

could move to Big Delta and work back towards Cathedral.

Q. Did you overhear Mr. Crawford with respect to that suggestion of Mr. Tope's?

A. He just said that it couldn't be done that he had to stay there to finish what he had started.

Q. Did you overhear any conversations between Mr. Hager and Mr. Tope concerning that same subject?

A. No, I don't believe I did.

Q. Now, Mr. Bayless, what was the amount of the fuel bill that you say you were not paid for?

A. I believe it was three thousand and twenty-nine dollars.

Q. You have commenced a lawsuit to try and collect that amount, have you not?

A. I gave it to Mike Stepovich to try and collect, but so far nothing become of it.

Q. Did you contact Oaks or any representative of the Oaks Company, in an attempt to collect that money?

A. I talked to Mr. Oaks a couple of times about it.

Q. Well, that was—that money did represent fuel [410] that went into Tope's equipment, didn't it?

A. Yes.

Q. Well, what did Mr. Oaks say with respect to paying you for that amount?

A. Well, on one occasion, he said that he would pay it but right then that he was—he didn't have the money, but when he did get it that I could get the money.

(Testimony of John Howard Bayless.)

Q. Did you have an occasion to contact him again at another time on the same subject?

A. I just don't remember, but we talked about it at least once or twice; I don't know just how many times.

Q. At that time, when you were contacting Oaks for the payment of that amount, you were a little short of money yourself, weren't you?

A. Yes, I could have used it very nicely.

Q. As a matter of fact, did you threaten to shut off all fuel to Tope's equipment unless you were paid that amount?

A. I did that several times while the job was being done.

Q. In order to get payment? A. Yes.

Q. Well, did you threaten to do it with respect to [411] that amount?

A. Well, it so happened that they kept paying on it but never paid this amount that I had got this check for.

Q. Well, did you get a check for this amount?

A. I—no I didn't. I got a three thousand dollar check from Mr. Tope.

Q. And what were the circumstances under which you got that check?

A. The night that Mr. Tope gave me the check for his oil bill was, I imagine, right around three thousand dollars and I stopped the fuel deliveries until I got paid, and Mr. Crawford said that Mr. Tope had a large estimate for that month and by the time the check would get into Anchorage, the money

(Testimony of John Howard Bayless.)

would be in the bank and so Mr. Tope wrote me a check at the end of that month and I sent it into Anchorage and a week or ten days, or two weeks, it came back "insufficient funds."

Q. Had you contacted Mr. Tope about that check? A. Yes, I had.

Q. And did you contact any one of Oaks Construction Company about it?

A. I called up Mr. Hancock and told him that the [412] check was no good and that I would have to have some money and that is as much credit as I could afford to give them and I would have to be paid before any more oil would be delivered.

Q. Were you paid for the amount represented by that NSF check?

A. No, but they gave me some money; I have forgotten just how that went, but that check was never made good.

Q. And you have never been paid yet for that amount, have you? A. No.

Q. Well——

The Court: That is what he said, that some payments were made on some others later then the three thousand and twenty-nine dollars.

A. It was on the—they continued to get fuel as the job went along.

The Court: But no payment on this debt of three thousand twenty-nine dollars?

A. No.

Q. (By Mr. Nesbett): Did any representative of the Oaks Construction [413] ever contact you

(Testimony of John Howard Bayless.)

with respect to prosecuting Stuart Tope because of that NSF check?

Mr. Dunn: I object, your Honor, they have been—well, I object. It seems to me highly irrelevant here; again, he is attempting to show some damage over and beyond that prayed for.

The Court: Yes, to show the attitude of the defendant at the time toward this indebtedness.

Mr. Nesbett: Yes.

The Court: He says the defendant, through Mr. Crawford, agreed to put the money in—that is the money that was to be paid over to Mr. Tope and he would then be able to take care of the check. Now then, in light of that testimony, I think it would be competent to say what they did after the check was refused, returned “without funds.”

Q. (By Mr. Nesbett): Were you contacted by any representative of Oaks Construction Company concerning prosecuting Mr. Tope for this NSF check?

Mr. Dunn: Same objection, your Honor. This is not a question of the return of an [414] NSF check, it is a question of prosecution.

The Court: That is what counsel asked him.

Q. (By Mr. Nesbett): Were you——

A. Yes.

Q. And who contacted you?

A. Mr. Hancock.

Q. And is Mr. Hancock connected with the Oaks Construction Company?

A. Yes.

Q. Where did he contact you?

(Testimony of John Howard Bayless.)

A. At Tok Junction, at our place.

Q. And approximately when?

A. In the evening, and I imagine it was along the first part of February.

Q. Of what year? A. 1954.

Q. And of what month of 1954?

A. It was—I'm not too good on dates, but it was——

Q. Was it after the pipeline clearance was over?

A. No, it was like the job started in December, and it was the following February when——

Q. Does this photostat that I hand you refresh your recollection of any circumstances in [415] connection with that check that you have been telling the Court about? A. Yes.

Q. And what was the date on that check?

A. March 31, 1954.

Q. Is that a true copy of the check you received from Mr. Tope? A. Yes.

Q. Now, does that refresh your recollection to the extent that you can state approximately when you were contacted by Mr. Hancock, with respect to prosecuting Mr. Tope?

A. I would say it was in April; probably the first part of April.

Q. Of 1954? A. Yes.

Q. And did you talk with Mr. Hancock?

A. Yes.

Q. Where did you talk to him?

A. At our home at Tok.

Q. At your home in Tok? A. Yes.

(Testimony of John Howard Bayless.)

Q. Was anyone else present?

A. The wife was there, but she was busy cooking and she didn't pay any attention to what [416] Mr. Hancock and I were talking about.

Q. And what was your conversation with Mr. Hancock concerning that check?

A. Well, he was interested in finding out if Tope had anything and he says, "You're the only one that has anything on him and we would like to find out and if you will exercise this check against him, why we will pay the expenses that is incurred."

Q. Did Mr. Hancock tell you how he suggested you execute this check against him?

A. No, I told him I wasn't interested in that type of business, and that I had made a deal with Mr. Oaks and Mr. Butcher and they guaranteed their subs oil and fuel bill and being that Tope—the money wasn't put in the bank for Mr. Tope and he didn't write the check with the thought of it not being good, why I couldn't see bringing action against him.

Q. Did Mr. Hancock suggest you take the check to the district attorney?

A. No, I don't believe he did.

Q. What manner did he suggest you use the check against Mr. Tope; do you recall any of the details? [417]

A. Well, I take it that he meant to take it to court, or I imagine that is where they do it; he said prosecute him just for writing a "bum" check.

Q. I think that is all.

The Court: You may cross-examine, Mr. Dunn.

(Testimony of John Howard Bayless.)

Cross-Examination

By Mr. Dunn:

Q. Mr. Bayless, over what period of time did you furnish fuel for this job?

A. For the entire time it took to complete it.

Q. Now, when I refer to the job, what do you understand me to refer to?

A. Clearing the right of way on the pipeline.

Q. All of it or only a particular part of it?

A. The section between Tok and Big Delta.

Q. That's the only part that you are talking about?

A. That's right.

Q. I wanted to clarify that; in other words, we are talking only about the section that Stuart Construction Company was clearing, is that right?

A. That's right.

Q. Now, did you carry an account on your books for this fuel that we have been talking about here? [418]

A. Yes.

Q. Do you have a copy of that account with you?

A. No, I don't.

Q. In what name did you carry it?

A. Franklin Mining Company.

Q. Who did you charge it to?

A. Stuart Tope.

Q. Stuart Tope. And you did that throughout the job, is that right?

A. Yes.

Q. Mr. Bayless, is that a true copy of the check that was given you?

A. Yes.

Q. And who is the——

The Court: It is a copy of the original.

(Testimony of John Howard Bayless.)

Mr. Dunn: That is a photostatic copy.

The Court: Very well.

Q. Who is the drawer of that check; who signed it? A. Well——

Q. I'll strike that. Who is the drawer of the check? Do you understand what I mean by that? On what account is that check to be paid? [419]

A. It was to be paid on Stuart Tope's fuel account.

Q. Well, looking at the check, according to the check, who is paying this money?

A. Stuart Construction Company.

Q. Is it?

The Court: N. C. follows that. "N. C. Stuart Construction Company, Inc., is that right?

A. No, it says, "Company" there.

Q. Well, doesn't——

The Court: N. C. follows it there?

A. Oh, yes.

Q. And who signed for Stuart Construction Company? A. Tope signed the check.

Q. Stuart E. Tope. And that is what date, please? A. March 31, 1954.

Q. And you carried this fuel account in the name of Stuart Construction Company? A. Yes.

Q. I don't—I would like to have the original.

The Court: It has already been in evidence.

Mr. Dunn: It hasn't been.

The Court: What I mean is, we know [420] all about it, so you can put it in evidence. I think you might clarify this question as to whether or not these accounts were charged, whether this fuel bill

(Testimony of John Howard Bayless.)

was charged to Tope or Stuart Construction Company.

Mr. Dunn: Well, he just has, has he not.

The Court: Well, he says the check was drawn by the Stuart Construction Company, although Mr. Tope originally drew it.

Mr. Dunn: I know, that is the reason I wanted to clarify that.

The Court: But how was the account kept?

Q. (By Mr. Dunn): Didn't you testify that the account was carried on your book in the name of Stuart Construction Company, Inc.?

A. I believe that is right.

Q. Yes.

The Court: Well, that settles it.

Mr. Dunn: That is Exhibit L, is it?

The Clerk: That is right.

Q. In the winter of 1953, 1954, Mr. Bayless, in that area it is pretty cold, you so testified [421] didn't you? A. Yes.

Q. How about snow, do you have a lot of snow?

A. No, there was a reasonable amount, probably three and a half feet.

Q. On the ground at one time, say you had three and a half feet? A. Yes.

Q. Is it normal to have that much snow in that area when it gets down that cold?

A. Well, no, it don't snow when it is that cold, but it snows when it isn't that cold.

Q. Well now, by three and a half feet—I don't remember, I may have asked you this, I am sorry,

(Testimony of John Howard Bayless.)

I am not sure. Do you mean on the ground at one time or during the winter?

A. During the winter.

Q. About three and one half feet? A. Yes.

Q. You said you brought a suit on the check, didn't you?

A. Yes. I gave the bill to Mike Stepovich, made out to Stuart Construction Company, against the job on the pipeline. [422]

Q. You sued Stuart Construction Company, is that right?

A. I believe that is the way it went.

Q. Now, did you also sue Oaks? Did you sue them both?

A. No, I didn't sue—I didn't sue Mr. Oaks.

Q. If I showed you copies of pleadings in that action, so that—would you be able to recognize them?

The Court: Do you know, are you advised by whom against the suit was brought? Then you just spill that, if it is a fact.

Q. My recollection, your Honor, is that he sued them both.

The Court: He did sue them both.

Q. Yes, Stuart Construction——

The Court: Any objection to that statement by counsel?

Mr. Nesbett: No, your Honor, that is my understanding, the same as the Harlan suit.

The Court: Sued Stuart Construction Company?

(Testimony of John Howard Bayless.)

Mr. Dunn: And Oaks.

The Court: Mr. Oaks or his [423] corporation?

Mr. Dunn: No, he doesn't have a corporation.

The Court: I see, doing business as——

Mr. Dunn: Yes, it is alleged partnership here.

The Court: Anyhow he sued the two?

Mr. Dunn: Beg your pardon?

The Court: I understand it is agreed that both were sued?

Mr. Dunn: Yes.

Q. (By Mr. Dunn): Do you say that Mr. Tope seemed to be running up and down the highway quite a bit?

A. Yes, he was busy on the highway.

Q. Did you see more of him than most anybody else?

A. Yes.

Q. Isn't it a fact, Mr. Bayless, that after this account had accrued, only after it had accrued, only after this indebtedness had built up, then Oaks told you that he would do his best to see that it was paid?

A. Yes. [424]

Q. Now, Mr. Bayless, there seemed to be some confusion in your mind about—well, I don't think it makes any difference. Now, did you testify that Mr. Hancock urged you to sue Mr. Tope, or rather Stuart—it would be Stuart Construction Company, wouldn't it, or Tope?

A. It could be either one or both.

Q. Either one or both? Well, at any rate, did you say that Hancock told you to bring suit so as to find out what the proposed defendant had? By

(Testimony of John Howard Bayless.)

the "proposed defendant," I mean Stuart Construction Company or Tope. A. Yes.

Q. Try to find out what assets they had?

A. Yes.

Q. What money or property? A. Yes.

Q. Did he tell you why he was interested in that? A. No, he did not.

Q. But that is what he was interested in?

A. Yes.

Q. Finding out what assets Tope or Stuart Construction had? A. Yes. [425]

Mr. Dunn: I have no further questions.

The Court: Any redirect?

Mr. Nesbett: Yes, your Honor, I have a question.

Redirect Examination

By Mr. Nesbett:

Q. Did you say that it was only after the account had built up that Mr. Oaks told you he would do his best to see that it was paid?

A. Well, it was some time afterwards that Mr. Oaks and I met at Copper Center and talked about it, about the account; that job was over with then.

Q. You were originally furnishing the fuel, was that based on Mr. Butcher's assurance that he would guarantee payment?

A. Yes, because I didn't know any of these subs and it was through their acquaintance that I would extend the credit.

Q. I have no other questions.

(Testimony of John Howard Bayless.)

Recross-Examination

By Mr. Dunn:

Q. You say, you didn't know any of these other subs?

A. Not before the job was started; I knew none of them.

Q. Well, did you also testify that during the progress of the work you became rather conversant [426] with Tope's activities on this job? And that you learned quite a bit about what Tope was doing on that job? A. Yes.

Q. You did learn quite a bit about him?

A. Yes.

Mr. Dunn: No further questions.

The Court: Is that all now?

Mr. Nesbett: Yes, your Honor.

The Court: Any other witnesses?

Mr. Nesbett: I have one other witness.

The Court: Very well. We better suspend this case until tomorrow morning at ten o'clock.

Gentlemen, how much longer will this case take?

Mr. Dunn: Well——

The Court: Will you have rebuttal?

Mr. Dunn: Yes, Sir, and then I have got a case to present.

The Court: Yes, oh, yes, you have; I have forgotten how many days; this is the end—one more witness and you rest, Mr. Nesbett. How much time will it take for you to try your case, Mr. Dunn, for the defendant? [427]

(Testimony of John Howard Bayless.)

The Court: The way it has been going it will be next summer, but then you can make an estimate.

Mr. Dunn: Well, it is not going to be past August 20, and that I'll guarantee you, your Honor.

The Court: The issue is a very simple one here and you have covered everything else, but the case, most of the time.

Mr. Dunn: Well, your Honor, my feeling now is—Mr. Nesbett has one witness and I have several in rebuttal, and also I will use those witnesses to prove my counterclaim.

The Court: Of course, you would have no rebuttal; the plaintiff may have some rebuttal testimony. On your counterclaim you would, yes; you would have rebuttal on your counterclaim.

Mr. Dunn: I don't see how in the world we are going to be through before the end of the week.

The Court: Very well. We will suspend until ten o'clock tomorrow morning.

(The Court then recessed until Thursday, August 14, 1958, at ten o'clock a.m.) [428]

The Court: Are the parties ready to proceed with the case on trial?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. I believe you have a witness. At least you had one more witness. You may have one that you would want to return to the witness stand.

Mr. Nesbett: Your Honor, I have. This witness, Mr. Harlan, I will call him at this time, and your

(Testimony of Arthur J. Harlan.)

Honor, I do have another witness that I am looking forward to subpoenaing, but he would be a very short witness, and——

The Court: It is all right, whatever the length of time if it is an important witness.

Mr. Nesbett: Call Mr. Harlan.

ARTHUR J. HARLAN,

being first duly sworn upon oath, deposes as follows:

The Court: As I say, Mr. Nesbett, you are not bound by the suggestion that you have only one witness because you have the right to put on as many witnesses as you think to put on the case.

Direct Examination

By Mr. Nesbett:

Q. Is your name Arthur J. Harlan?

A. That is correct.

Q. Where do you reside, Mr. Harlan?

A. I am living at the Parsons. [430]

Deputy Clerk: Is that H-a-r-l-a-n?

A. Yes.

The Court: Where did you say you resided, Mr. Harlan.

A. At the Parsons Hotel at the present time.

The Court: Here in Anchorage?

A. Here in Anchorage.

Q. Where did you reside—were you residing in Alaska in 1953? A. Yes, I was at Tok Lodge.

Q. How long have you lived in Alaska?

A. Since about '35.

(Testimony of Arthur J. Harlan.)

Q. What is your business?

A. I am a dozer operator and heavy duty mechanic.

Q. Mr. Harlan, I will ask you whether or not you had occasion to discuss employment on the Haines pipeline clearing project?

The Court: Discuss what, Mr. Nesbett?

Mr. Nesbett: Sir.

The Court: Discuss what? I didn't understand.

Mr. Nesbett: Employment with Mr. Tope concerning the Haines pipeline clearing job in 1953.

A. I did.

Q. Where did you discuss employment?

A. At Tok Lodge.

Q. And approximately what month?

A. It was in December, possibly along the 20th. [431]

Q. Were you employed by Mr. Tope as a result of those discussions? A. I was, yes.

Q. Approximately when were you employed?

A. Sometime in December, towards the middle or towards the—maybe a little after the middle of the month.

Q. Would it be the month of December?

A. The month of December.

Q. And——

A. Or the month of January, rather.

Q. The month of January and not the month of December? A. That is correct, yes.

Q. You first discussed it with him, did you, in the month of December?

(Testimony of Arthur J. Harlan.)

A. I first discussed it with him in the month of December.

Q. But you were not employed until——

A. Until January.

Q. Approximately when in January, sir?

A. Well it was possibly around the 20th, 21st, something like that.

Q. What were you employed to do?

A. Dozer operator.

Q. Did you go to work as a dozer operator?

A. Yes, I did.

Q. And how long did you work?

A. Three days. [432]

Q. Did your work terminate at the end of three days? A. That's right.

Q. And will you state the circumstances of the termination?

A. Well, Mr. Crawford came out from Fairbanks and told me that I wasn't on the payroll.

Q. Did Mr. Crawford tell you or give you any reason why you weren't on the payroll?

A. He said that they had a man in Fairbanks or someplace that they had to bring out to put on the dozer, that was, I think, a brother-in-law of one of the pipe pump operators on Conol pipeline, and if they broke a pipeline it would ease things off considerably for the construction company.

Q. Were you—did you receive any pay for those three days of work? A. No, I didn't.

Q. Did you make application for pay for that work?

(Testimony of Arthur J. Harlan.)

A. I turned in time cards for those days.

Q. Now, what did you do after your employment terminated there?

A. I continued to stay at the Lodge.

Q. Now, I will ask you whether or not you were employed at any subsequent time to work on that same clearing job?

A. Yes, I worked a little later.

Q. Who employed you?

A. Mr. Tope asked me to go down and overhaul a cat for him that had broke a piston. [433]

Q. And where was this caterpillar, Mr. Harlan?

A. It was close to Cathedral Bluffs.

Q. And what had happened to the caterpillar and what needed to be done?

A. Well, there had to be a new piston put in; the piston had broke and there had to be a new piston put in, and the cat started up. The head had to be taken off and quite a job in cold weather.

Q. At the time you were employed by Mr. Tope to do that work did you know that you weren't going to be paid for your other three days' work?

A. Well, Mr. Tope told me that he would pay me some way and Mr. Oaks told me to go ahead and do the job.

Q. Mr. who told you? A. Mr. Oaks.

Mr. Dunn: Mr. Oaks or Mr. Tope?

A. Mr. Tope and Mr. Oaks, both.

Q. How long were you employed doing that job?

A. It must have been six or seven days.

(Testimony of Arthur J. Harlan.)

Q. Did you finish the job and put the cat back into operation? A. I did.

Q. Did you turn in time for that work, sir?

A. I turned in time cards.

Q. Were you ever paid for that work?

A. No, I wasn't. [434]

Q. Now, Mr. Harlan, during the three days that you were operating the dozer in that area, just what area of the pipeline right of way with respect to Tok were you working in?

A. Well, it was along by Yerrick Creek.

Q. Would the Yerrick Creek be anywhere near Cathedral Bluffs?

A. About five or six miles up the road in a southeasterly direction from Cathedral Bluffs.

Q. Do you recall generally the temperature range in that area during the month of January and February of 1954?

A. Oh, it was running from 40 to 65 below zero.

Q. During the time you were operating the dozer did you observe that the right of way was covered in any points or areas covered by rocks?

A. Yes. I run into rock and broke the dozer arm.

Q. During the three days you were operating?

A. That's right.

Q. Was that cat put out of operation by reason of that casualty?

A. About three-quarters of the day.

Q. Who repaired the cat?

A. I and Mr. Tope.

Q. And what did you do to repair it, briefly?

(Testimony of Arthur J. Harlan.)

A. Well, he went up and either hired or borrowed a dozer from Lytle and Green that had a camp up by the forty mile roadhouse, and we brought it down and put it on and the cat was back into commission. [435]

Q. When you say you borrowed a dozer, what part of the cat is that?

A. That is what you dig with, the dozer, and dozer arm that goes in front of the cat that you push snow with.

Q. That is an attachment to the cat?

A. That is an attachment to the cat.

Q. Mr. Harlan, during the time you were operating that dozer and repairing the caterpillar, did you have an opportunity to observe whether or not Mr. Tope was the boss of that particular clearing area?

A. Well, I don't know whether he was or not. He was helping get the cats ready to go in the mornings and hauling fuel and was helping repair them, and he helped me on the cat that was down. He helped me what time he had.

Q. Did you know a man named Hager?

A. Yes, I did.

Q. Was he working there at that time?

A. Yes.

Q. What were his duties generally?

A. He seemed to be overseeing the job.

Q. During the time you were operating the cat from whom did you receive instructions as to where you were to run and what you were to do?

A. Well Hager came out and showed us turns

(Testimony of Arthur J. Harlan.)

and pipeline and where the station was, and so on and so forth and told us [436] how to clear the road right of way and what to do with the berm as to tramp it down and so on and so forth.

Q. Did you receive any instructions from Mr. Tope as to where and how you were to operate that cat?

A. No, I don't remember receiving any.

Q. From your observation of the authority situation on that project, would you say that Tope was running that job as far as the clearance was concerned or Hager?

A. Well, I would say that Hager was running the job.

Q. Now, did you have occasion, Mr. Harlan, to do any other work on that particular pipeline clearance project?

The Court: Before you approach that, Mr. Nesbett, would you find out from the witness the date when he fixed that last caterpillar?

Q. Approximately when did you make repairs on that last cat, Mr. Harlan?

A. Along in the first of February. I have the dates but they're in the lawyer's office in Fairbanks, and I don't remember the exact dates but it was somewhere in the first of the month of February.

Q. Were the repairs you made on that cat in the rocky area of Cathedral Bluffs? A. Yes.

Q. Is that where the cat was operating at the time?

(Testimony of Arthur J. Harlan.)

A. Yes, that is where the cat was operating. [437]

Q. Now, I believe I asked you, Mr. Harlan, did you have occasion to do any other work on that pipeline clearance project?

A. Yes, two different times. I worked for——

Q. What was the next occasion after you repaired the cat?

A. Well, the next occasion, I believe, I fixed up a pickup for Mr. Tope and then the next occasion after that, I went to work for Mr. Oaks down on the pipeline skinning cat again.

Q. What were the circumstances of that last employment and where did you work?

A. I worked down towards Big Delta. Don Heck come down one day and asked me if I wanted to go to work and I told him I did and he said, "Well," he says, "I am putting two cats on the pipeline," and he says, "I want my own men on them." I had worked for McLaughlin the year before and he was the superintendent of McLaughlin's, and so I went down to there and piloted a lowboy down, that the cats were on, down to Big Russian River where we unloaded them, I think, and I went to work down there.

Q. Mr. Harlan, who was your boss there on that job?

A. Well, Heck told me to look after the cats and see that they wasn't broke up and then my foreman down there was Slim Allred, Sterling Allred.

Q. Do you know where Mr. Allred is now?

(Testimony of Arthur J. Harlan.)

A. He is out at Dillingham.

Q. Now, at the time you were employed by Mr. Heck to work with [438] these McLaughlin cats, were any instructions given as to whether or not those cats could operate in a rocky area?

A. Yes. He told me very plain, he said that those cats wouldn't go in a rocky area; he said they would go on down by Big Delta.

Mr. Dunn: I object to this. He has already identified Mr. Atkinson, employee of Mr. McLaughlin. It is hearsay. He is not an employee of Oaks. He is quoting a little too much, I think.

The Court: Was it off this job?

Mr. Dunn: It may be in a sense, your Honor. In another way I think Oaks—Tope testified that he hired McLaughlin cats to come down there and Heck was McLaughlin's man.

The Court: There were three caterpillars brought in later on?

Mr. Dunn: Three cats——

The Court: That is about that time?

Mr. Dunn: Yes, sir.

The Court: The objection will be overruled.

Q. He said what with respect to operating them in the rocky area, sir?

A. He said they wouldn't be operated in the rocky area at all. He said too cold weather and there'd be too much breakage.

Q. Did you receive pay for working on those McLaughlin cats? A. Oh, yes. [439]

Q. And by whom were you paid?

(Testimony of Arthur J. Harlan.)

A. I was paid by Mr. Oaks.

Q. Have you ever received any money for any of the other work you have testified to?

A. No, I never have.

Q. Did you commence a lawsuit in an attempt to collect that money? A. I did.

Q. And do you know whom your attorney named as defendants?

A. That was Robert Parrish—I don't know who he named. That was the reason I got him to do it.

Q. Now, have you ever owned caterpillars of your own, Mr. Harlan? A. I have.

Q. Have you ever rented cats? A. Yes.

Q. Can you advise the Court what a reasonable rental rate would be for a D-8 caterpillar in January and February and March of 1954 to operate in the area of that clearance project?

Mr. Dunn: Your Honor, we object to that, merely for the sake of the record. I am satisfied of your ruling; because of it we consider it irrelevant in that we are proceeding under a contract.

The Court: Objection will be overruled. [440]

Q. You may answer the question.

A. I would think the cold weather would be from \$25 to \$45 an hour.

Q. Can you explain your answer, why you have that wide a range.

A. Well, you have so much breakage in cold weather that it would seem fair to me that it is a pretty fair rental to take care of the breakage.

Q. Now, when you gave that estimate, was that

(Testimony of Arthur J. Harlan.)

estimate to include the furnishing of an operator for the cat and all the fuel and general maintenance?

A. I think that would, yes. That is what you usually base those things on.

The Court: Has the witness some notion about what it would be where the fuel is furnished and where an operator is furnished, just where the caterpillar is rented alone?

Q. Mr. Harlan, can you give an estimate based on your experience, as to what a caterpillar could be rented for by a contractor to operate in that area in that kind of weather where the rentor would furnish the operator and fuel and all that?

A. Well there would be a deduction there. I haven't figured it out. It would be easily figured. You get the price of fuel at that time and so on and so forth, but I would say from \$20 to \$35.

Q. If the person renting a cat furnished the driver—furnished [441] the fuel, the rate would be considerably reduced, would it not?

A. It would be reduced some, yes.

Q. Are you able to give any figure from your own knowledge or experience?

A. No, I don't have anything that I would have figured, would be the only way I could come to an answer on that question.

Q. How would you set about figuring it?

A. Figure the price of fuel and hourly wages for the driver and so on and so forth.

Q. Subtract that from the hourly rental figure?

(Testimony of Arthur J. Harlan.)

A. Yes. Your breakage would be the same no matter who was operating the cat.

Mr. Nesbett: That's all, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Dunn:

Q. What reason, Mr. Harlan, did you say Mr. Crawford gave when he took you off the job the first time you were hired?

A. He said that he had a native by the name of Johnny Westland that was a brother-in-law of one of the operators on the Conol pipeline, operated the pump on the Conol pipeline and that it would ease theirs considerable if they had this Westland on in case they broke the pipeline and lost fuel out of the Conol pipeline. [442]

Q. What is the Conol pipeline? I don't see the connection.

A. The Conol pipeline was right along the right of way of the new pipeline; right of ways crossed occasionally.

Q. How was hiring Westland supposed to help this operation out?

A. I wouldn't understand that.

Q. Mr. Crawford say anything to you about your union status?

A. No, he didn't have any reason to say anything about the union status.

Q. Did he say anything to you about your union status? A. Not until he hired me, no.

(Testimony of Arthur J. Harlan.)

Q. Then what did he say?

A. He said he had a dispatch for me.

Q. And when was that?

A. That was when I was working on the McLaughlin cats.

Q. Some time later? A. Quite a bit later.

Q. He had no dispatch for you at the time you allege he discharged you, is that true?

A. I wasn't discharged; I was just told I wasn't on the payroll.

Q. Did he have a dispatch from the union for you at that time? A. No, he didn't.

Q. How much snow was there around Cathedral Bluffs at this time?

A. Oh, I would say from 20 to 24 inches.

Q. Did I understand you correctly to the effect that you worked twice on this line before you were hired to run these [443] McLaughlin cats, is that correct?

A. No, I just worked once on the pipeline before that.

Q. And that was your first three days of the cat skinning? A. That is right, yes.

Q. But thereafter——

A. Afterwards I worked on it.

Q. The repair cat? A. To repair the cat.

Q. And that was the only work you did until you went to work regularly on the McLaughlin cats?

A. I done some work on a pickup.

Q. Oh. Is that the only appreciable work prior to the time you went to work on the McLaughlin

(Testimony of Arthur J. Harlan.)

cats? A. That is right, yes.

Q. Now, this cat that you fixed near Yerrick Creek, how long did it take you to fix it?

A. That was near Cathedral Bluffs. That was—it took me about six days I think was what it was on that, either six or seven days.

Q. So the cat was down six or seven days?

A. That is right.

Q. Was Hager around when you went to work for McLaughlin?

A. No. He left and had went down and went to work for, I think, on the Tennessee-Miller end of the spread towards Fairbanks. That is where he told me he was going. [444]

Q. Well, it is true then, is it not, that your opinion as to who bossed this job is based upon operating a cat for about three days and also fixing the cat that needed a piston replaced?

A. No, it isn't. It is based on arguments I heard around Tok Lodge when I was there.

Q. Well, then, it is based upon your fixing the cat and operating the cat for three days and what you heard other people say?

A. No, what I heard Mr. Hager say.

Q. What you heard Mr. Hager say?

A. That's right.

Q. When he was arguing?

A. When he was telling Mr. Tope what to do.

Q. How did Mr. Tope react to that?

A. Well, he argued back with him.

Q. He disputed what Hager said?

(Testimony of Arthur J. Harlan.)

A. Yes. He was trying to get to make a move.

Q. I am not asking you what he was trying to do. I asked you if he disputed what Hager said.

A. That is right.

Q. He had to be to argue with him?

A. Uh huh.

Q. Now, the first two times to repair this cat and to operate the cat for three days, did you not testify that Tope hired you?

A. Yes. Tope told me I could go to work. [445]

Q. Well, now, did you testify too, Mr. Harlan, that it doesn't make any difference who runs the cat as far as breakage is concerned?

A. Well, there is some people that is rougher than others on cats.

Q. Then it does make a difference?

A. It does make a difference.

Q. Now, did you also testify that you would consider a reasonable rental between—to be between \$25.00 and \$45.00 an hour?

A. Yes, I believe so.

Q. Do you believe that those rental figures vary that much throughout the construction business?

A. Well, if I was putting a cat in there, I wouldn't put it under those rocks for less than that.

Q. Please, Mr. Harlan, do you believe throughout the construction trade that those figures vary that much? A. Yes, I do.

Q. Are you—how many years have you had in connection with construction business?

A. Oh, possibly 35.

(Testimony of Arthur J. Harlan.)

Q. Now, do you know what the practice in the construction business is with respect to setting a rate when a cat is going to work on an hourly basis?

A. Yes, I do. [446]

Q. Do they set that rate and then put the cat to work?

A. Ordinarily that's the custom, yes.

Q. That would be the custom, wouldn't it?

A. Yes.

Q. Did Mr. Tope ever leave that pipeline job?

A. Well, he had gone to town after parts once in a while, Fairbanks; then he would haul gas.

Q. I mean, that is not what I mean. I mean, did he ever stop working on that job?

A. Oh, yes. Along, oh, when the job was pretty well finished he talked to me one day; I seen him; he come back; the McLaughlin spread, and told me that he wasn't doing any good there, he might just as well go to town. I don't remember the date.

Q. Did Mr. Tope tell you this: "I am not even on the job. I am going to leave."

A. I believe he did, yes.

Q. At the time your deposition was taken, Mr. Harlan, do you remember whether or not you testified to this effect: You are quoting Tope: "He said, 'I am not on the job even';" "he said, 'I am going to leave,'" and he loaded his stuff up and left." Do you remember so testifying?

Mr. Nesbett: Which page is that, Mr. Dunn?

Mr. Dunn: It is page 13 at the line right down at the bottom. Do you remember so testifying?

(Testimony of Arthur J. Harlan.)

A. Yes, I remember making that statement. [447]

Q. And I take it that is true testimony?

A. That is true testimony.

Q. Mr. Harlan, I hand you this instrument and ask you if it does not have written on it, across its face: "Oaks Construction Company #3211"?

A. That's right.

Q. And what is that instrument I hand you?

A. It is a pay check for \$80.15.

Q. Drawn by whom? Who wrote the check?

A. Carl Oaks. Oaks Construction Company.

Q. And to whom is it payable?

A. Arthur Harlan.

Q. And when is it dated?

A. January 30, '54.

Q. January 30 of '54. Now, I invite your attention to the reverse side of that check and ask you if you recognize any signature on the back of it?

A. I don't think that is my signature.

Q. Do you think that is a——

A. Besides that isn't my name.

Q. That isn't your name?

A. My name is H-a-r-l-a-n.

Q. Is it your writing?

A. I don't think it is.

Q. Some doubt in your mind about it? [448]

A. Uh huh.

Q. You think that—is there—is it just a matter of a doubt or do you know it is not your signature?

(Testimony of Arthur J. Harlan.)

A. Well, I write my name and it could be compared by an expert.

Q. I would think you would be familiar enough with it to recognize your own writing. You spell your name H-a-r-l-a-n, don't you?

A. That's right.

Q. And is not the payee on that check spelled H-a-r-l-a-n-d? A. That is right.

Q. And that signature on the back is H-a-r-l-a-n-d, isn't it? A. Uh huh.

Q. Well do you recognize the handwriting of that signature?

A. It looks like my handwriting.

Q. Pretty similar, isn't it?

A. Very similar, yes.

Q. Now, Mr. Harlan, I hand you another instrument and ask you whether or not it has written across the face of it "Oaks Construction Company #3222"? A. Uh huh. That's right.

Q. And to whom—what is this instrument?

A. That is a check.

Q. And to whom is it payable?

A. Arthur Harlan.

Q. How is Harlan spelled on the face of that check? [449] A. H-a-r-l-a-n-d.

Q. Same as the other one? A. Yes.

Q. And who drew that check, please?

A. Oaks.

Q. Oaks Construction Company?

A. That's right.

Q. Now, I invite your attention to the back of

(Testimony of Arthur J. Harlan.)

the check, and I ask you if you recognize any writing on the back of that check?

A. Yes, it is my signature.

Q. Now, both of those checks are made out to l-a-n-d, but one of them is——

A. No, this is made out to l-a-n—well it is l-a-n-d, yes.

Q. Both of those checks are made out to H-a-r-l-a-n-d? A. Uh huh.

Q. And one is endorsed l-a-n and other l-a-n-d, is that right? A. That's right, yes.

Q. One you know is your signature?

A. One I know is my signature.

Q. And the other one looks quite a bit like it?

A. Uh huh.

The Court: What is the date of that last check?

Mr. Dunn: Beg your pardon. [450]

The Court: What is the date of that last check?

A. This is February 6, '54.

Q. Well, Mr. Harlan—not knowing, I'll strike that. I would like to offer these two checks, please, your Honor. Mr. Harlan, when did you go to work on those McLaughlin cats?

A. I don't remember the exact date.

Q. Approximately, please.

Mr. Nesbett: No objection.

A. I went to work on them when the two cats went down on the lower end of the pipeline clearing but I don't remember the exact date.

Q. I realize you don't remember the exact date, Mr. Harlan; can you tell me approximately when it

(Testimony of Arthur J. Harlan.)

was? Would it be in late February or mid-March or——

A. I think it was sometime in March.

Q. You went to work as a cat skinner, did you not?

A. That is right.

Deputy Clerk: Defendant's Exhibit M.

Q. Well, do you recall, Mr. Harlan, whether or not after you went to work regularly there was any discrepancy in the spelling of your name on the pay checks you received?

A. I don't remember whether there was or not. I think it was spelled right.

Q. Now, I hand you an instrument and ask you if this is not the check of Oaks Construction Company dated March 8, 1954, [451] spelled—numbered 3366?

A. Yes, it is.

Q. And how does your name appear on that?

A. It has got the "d" added here, H-a-r-l-a-n-d.

Q. So apparently there was a definite confusion about your name?

A. I don't know why there should be; they had my social security number and my name and everything.

Q. But apparently there was?

A. Apparently there was, yes.

Mr. Dunn: No further questions, your Honor.

The Court: Is there any further redirect?

Mr. Nesbett: Yes, your Honor, a few questions.

(Testimony of Arthur J. Harlan.)

Redirect Examination

By Mr. Nesbett:

Q. Mr. Harlan, when you were attempting to answer a question there in connection with your observations in the Tok Lodge, you mentioned arguments between Tope and Hager?

A. That's right.

Q. What was the nature of those arguments?

A. Well, whether Tope could go to the Big Delta end of the pipeline and start back or whether he had to work through the rocks at Cathedral Bluffs.

Q. And can you recall what Tope wanted to do?

A. He wanted to move down on the Big Delta end while it was cold weather and work back. [452]

Q. And what did Mr. Hager say to that?

A. He said it couldn't be done; he said he had to work right on through the rocks and wouldn't let him do it.

Q. Now, at the time you were first employed by Mr. Tope, I'll ask you, were you a member of the dozer operators union in good standing?

A. I was a member of 302 Operating Engineers in Fairbanks; that is what they do.

Q. Were you in good standing with that union?

A. That's right.

Q. Now, do you recognize this paper, Mr. Harlan? Have you ever seen it before?

A. That's a file for suit, I guess, against the Stuart Construction Company by me, in Fairbanks.

Q. Did your attorney prepare that paper?

(Testimony of Arthur J. Harlan.)

A. I don't know whether he did or not.

Q. Turn the page and see if you recognize it at all?

A. Yes, that is a suit I brought against Stuart Construction Company.

Q. Did—is that the first time you have actually read the complaint?

A. That is the first time I have actually read the complaint, yes.

Q. If I told you that was suit #A-8989, filed in the District Court of Alaska in the Fourth Division, by Robert Parrish, [453] against Stuart Construction Company and Oaks Construction Company for the sum of \$527.19, would you say that that represented your claim for wages or work done on this pipeline clearing project you have been testifying about for which you were not paid?

Mr. Dunn: I object. I think it is pertinent to establish who he sued but the amount of his claim, I don't think has got anything to do with this.

The Court: Well, tabulation is with relation to the work he did on this job, why then it would be competent. If it is to something else, why it would not be.

Q. Does that represent the amount you claimed for the work done?

A. Yes, the—the work and the jeep Vince Abbott hired from me for the Oaks Construction Company for Slim Allred to use on his share of the pipeline.

Q. Did you rent a jeep to Oaks Construction Company? A. That's right.

(Testimony of Arthur J. Harlan.)

Q. Was it your personal jeep?

A. It belonged to the Tok Lodge and I was buying it. It was my personal jeep.

Q. And how long did Oaks Construction Company rent that jeep from you?

A. They had it about two weeks.

Q. And do you recall if any rental was established? [454]

A. Yes. Abbott told me, oh, \$100 a month was the established rate and I told him okay.

Q. Did you make application for reimbursement at that rate?

A. Yes, I did, and I didn't get any answer from it and then Vince Abbott came through, past the Lodge, and asked me if I got anything from it and I told him I didn't, and he said well he would write out a card on it and take it in, he was going into Anchorage and take it in and see that I got my money.

Q. Did you give your attorney, Mr. Parrish, an accounting of what this \$527 represented when you went to see him?

A. Yes, he has an accounting of it.

Q. Do you remember these two checks that were shown to you that were admitted into evidence as Exhibits M and N. Were they?

Deputy Clerk: That is right, M and N.

Mr. Dunn: Is that the way you marked them?

Deputy Clerk: Yes. 3222 is M.

Mr. Nesbett: Do you remember those two checks? A. No, I don't remember them.

(Testimony of Arthur J. Harlan.)

Mr. Dunn: I was asking the clerk, your Honor, which numbered check is which exhibit. I didn't get that.

Deputy Clerk: 3222 M; check of January 30th was M and the other was N.

Mr. Nesbett: That's all, your Honor.

The Court: Is that all now? [455]

Mr. Dunn: Your Honor, I have a couple of questions; he brought out some new matter here.

Recross-Examination

By Mr. Dunn:

Q. Well is it not true, Mr. Harlan, that in order for a union man to go to work he not only has to be a member in good standing, he has to be dispatched, doesn't he?

A. No. You can go to work and your employer can send in for a dispatch.

Q. But it is the obligation of the man that hires you to send in for that?

A. Not necessarily, no.

Q. But it has to be done, doesn't it?

A. You have to have a dispatch to work on a union job.

Q. Now, with respect to this jeep, what model jeep was it? I assume the make was a Willys, is that right?

A. Yes, Willys jeep, an old Army model; I don't remember how old it was. I don't remember the model of it.

(Testimony of Arthur J. Harlan.)

Q. Well, approximately?

A. I don't remember the year. I said it was probably four or five years old.

Q. Good shape?

A. Fairly good shape, yes. It run, in good shape.

Q. Well, now, did you set the rental on that before you let Oaks take it? [456]

A. Vince Abbott come and told me what the rental would be and that play was out of any convenience to Slim Allred.

Q. Let me put the question this way: Did you agree with Oaks or one of his representatives what that rental would be before they took it?

A. That's right.

Mr. Dunn: No further questions, your Honor.

The Court: Is that all of this witness?

Mr. Nesbett: Yes, your Honor.

The Court: That's all, Mr. Harlan.

(Mr. Harlan left the witness stand.)

Mr. Nesbett: Your Honor, my other witness is not available yet, but I would like at this time to offer into evidence the deposition of Sterling Allred, taken in this case, pursuant to notice, and to publish it.

The Court: Any objection to it?

Mr. Dunn: Your Honor, I can't remember it. If he is going to publish it, I assume he will do so by reading the questions and requesting me to read the answers.

The Court: Well that would be a very good way to present it. However, the question is, is Mr. Allred within the jurisdiction of the Court or out.

Mr. Nesbett: Your Honor, he is——

The Court: However, no objection made to it, even if he was over here on the next block, that is a matter with which [457] I am not concerned.

Mr. Dunn: I don't know where he is. This witness, Mr. Harlan, I believe testified that he was in Dillingham.

Mr. Nesbett: That is the only word I have.

The Court: Well if he is not within the jurisdiction——

Mr. Dunn: Well he is within the jurisdiction if he is in Dillingham.

The Court: Where is Dillingham?

Mr. Nesbett: It is out to the westward here; it is not only in the Territory, it is in the Third Division. It is more than 100 miles from the Court, your Honor.

Mr. Dunn: Well, your Honor, that 100 miles—that is rule 45 and that 100 mile limitation is on the taking of depositions, not appearing as a witness before the trial unless I do not properly recollect that rule.

The Court: I think the statute provides that, refresh my memory, but I think it is 100 miles; you can even go within another state to go 100 miles.

Mr. Nesbett: Rule 26 says if he is not within 100 miles the deposition can be read.

Mr. Dunn: I'd like to have a chance to check the rules.

The Court: Suppose we read the deposition, and if it is not properly taken, I will strike it out.

Mr. Nesbett: Rule 26 does, your Honor, of the Federal Rule. [458]

The Court: I haven't got them here on the bench.

Mr. Dunn: Well, your Honor, it seems to me that it would be better to see——

The Court: I would shorten up the time. We lost so much time in this case. Let the deposition be read while we are here fumbling around getting rules and looking up where he is, why let's read the deposition and then you find out if he is within the jurisdiction of the Court, and he ought to have been subpoenaed, why I'll strike out the deposition. Is it a long deposition?

Mr. Nesbett: No, your Honor.

The Court: Very well.

Mr. Nesbett: And with counsel's permission I will skip the formal portions of it.

The Court: That will be good.

Mr. Nesbett: This deposition was taken, your Honor, at my request, pursuant to notice, with me present and Mr. Dunn present, in my office in Anchorage, Alaska, on the 17th day of July, 1958.

The Court: Where did he say he lives?

Mr. Nesbett: Mr. Allred says he lives in Fairbanks ordinarily. Is that what you asked me?

The Court: Yes, it is.

Mr. Nesbett: And he says in the deposition he doesn't expect to be in this area at all at the time of the trial. [459]

Mr. Dunn: Excuse me. Are you going to read the questions, and do you want me to read the answers?

Mr. Nesbett: I'd prefer to read the question and the answer, your Honor.

The Court: Very well.

Mr. Nesbett (Reading): "Sterling L. Allred, being first duly sworn upon oath by Gara H. Lyon, Notary Public in and for Alaska, testified as follows:

DEPOSITION OF STERLING L. ALLRED

Direct Examination

By Mr. Nesbett:

Q. Your name is Sterling L. Allred?

A. Yes, that's right.

Q. What is your business, Mr. Allred?

A. I work in heavy construction.

Q. How long have you been engaged in that business?

A. Well, all my life.

Q. Let me ask you how long you have been in Alaska?

A. Twenty-two years—I have been in Alaska.

Q. Were you employed by Oaks Construction Company commencing in the month of February, 1954?

A. Yes, I was.

Q. Who employed you?

A. Crawford was the man who hired me. He was a representative for Oaks.

Q. Would that be Roy C. Crawford?

A. Yes. [460]

Q. And where were you employed?

A. Fairbanks.

(Deposition of Sterling L. Allred.)

Q. Do you recall the date you were hired in February, 1954?

A. Gee, I can't—it was the latter part of February was when it was.

Q. In what capacity were you employed by Crawford for Oaks?

A. Equipment foreman.

Q. (By Mr. Dunn): Equipment foreman?

A. Yes.

Q. Did you go to work on that job?

A. Yes.

Q. To what area or what location were you assigned?

A. Well, I first went there—between Halfway House and Big Delta.

Q. Do you know whether or not you were employed to work on an area of the Haines Pipeline which was also being worked on by Stuart Tope?

A. Yes, I heard that after I went to work there but all the payrolls was handled by Oaks.

Q. Were you paid by Oaks Construction Company for the time you worked? A. Yes.

Q. That you worked on the job? A. Yes.

Q. Did you receive any compensation from Stuart Tope? A. None.

Q. Or the Stuart Construction Company?

A. No. [461]

Q. Were you given any instructions by Crawford concerning Tope before you went to report to the scene of activity?

A. No. The only thing he told me was that it

(Deposition of Sterling L. Allred.)

was part of Tope's job that they weren't getting done and they couldn't do it or some darn thing, I guess, so then they employed McLaughlin's cats.

Q. Were you employed to run McLaughlin's cats? A. Yes.

Q. Did you do that? A. Yes.

Q. Did you see Tope when you went to that area of the pipeline clearing job?

A. Not immediately when I first come down there. I seen him in a while but I reported to Vincent Abbott when I went down there.

Q. Do you know by whom Mr. Abbott was employed? A. By Oaks.

Q. Was he employed on the same area of the pipeline clearing job you were to work on?

A. Yes, he was.

Q. Do you know what his job was with Oaks Construction Company?

A. He was the superintendent there. He was my superior.

Q. Do you know his title or do you recall?

A. Superintendent, I think, of Operations.

Q. Of that particular area of the Haines pipeline clearing job? [462]

A. You mean over me?

Q. Yes. A. Yes, he was.

Q. Then did you take your orders from Vincent Abbott?

A. Vincent Abbott and Crawford also come down there—but it wasn't—sometime they didn't contact me for three, four days or a week, you

(Deposition of Sterling L. Allred.)

know. If there was any trouble I would call Dot Lake where Abbott was.

Q. Where did you first commence operations when you went to work there?

A. Well, approximately ten miles north of Halfway House, where the cats was when I went there.

Q. Were you given any instructions as to which direction to work in clearing for the pipeline?

A. Yes.

Q. What direction?

A. To work north to Big Delta.

Q. North to Big Delta? A. Yes, sir.

Q. When you first went on the job did you observe Tope on the scene of operations?

A. Well, yes, within a day or two he stopped by and I talked to him. That was the first time I knew him.

Q. Did you have occasion to see him off and on after that when you were working on this clearing?

A. Yes.

Q. Do you know what Tope was doing in that area himself? [463]

A. Yes, he was mostly running down parts and equipment for his cats up there and he would stop and talk and once or twice he traded pickups to come into Fairbanks to pick up parts.

Q. Did you ever have occasion to use any of Tope's equipment while you were clearing on that job?

A. Down on the south end, and coming together—when they brought the two units together and

(Deposition of Sterling L. Allred.)

when they were in a mile or two of each other I would go from end to end, and Abbott was also there at that time and I was trying to bring them in straight. That was the only time I used Tope's cats—not too many. I had McLaughlin's cats from the north.

Q. Do you know who was operating Tope's cats?

A. Gee, I didn't take care of their time. One of them was young Oaks, Duke Oaks I believe they call him. Who the others was I don't recall. I never had no occasion to handle their time cards so I wouldn't—

Q. Did you handle the time cards for the men on the cats you were responsible for? A. Yes.

Q. To whom did you submit the time cards?

A. To Vince Abbott.

Q. At any time while you were working on that section did you take instructions from Tope as to where you were to work? [464] A. No.

Q. Or what to do? A. No.

Q. From your experience in construction, Mr. Allred, would you say that Mr. Tope was running that area as a self employed contractor would ordinarily handle such an area?

A. No, I wouldn't. If that had been the case then I would have took my orders from him.

Q. Did you have occasion to use any of his pickups or trucks there? A. Yes.

Q. What did you use?

A. A pickup and also a station wagon he had there. At various times we had various equipment.

(Deposition of Sterling L. Allred.)

He drove one of Oaks' pickups for a while, and well, whatever the necessity amounted to, I guess. They would come and trade with me which was all right with me.

Q. At that time did you observe a man named Hager to be on the same job? A. Yes.

Q. Do you know what his function was?

A. He was working as an engineer. Whether he was chief engineer or not, I don't know. He was not the engineer stationed there on the job. His name was Bill something.

Q. Was Hager stationed on the same section of the pipeline clearing job you were on or do you know? [465]

A. No, I don't think so. I think he had a larger area clear to the Canadian border. He would drive up and down all the time.

Q. Had you been on that particular job prior to reporting to Vincent Abbott in late February, 1954?

A. No, I never had.

Q. Would it be true to state you were not familiar with what had gone on before you arrived?

A. No, I wouldn't be because my first contact was when I went down there and Crawford called me up one morning and hired me and told me my duties and I went down there. I went to Halfway House and reported to Vince Abbott.

Q. Would you say from your observations and experience there that Vincent Abbott was the immediate officer or official in charge of that clearing there? A. Yes, I would.

(Deposition of Sterling L. Allred.)

Q. Was he giving the orders?

A. He was giving the orders.

Q. How long did you work on that job?

A. Well, it was sometime in April but what the date was I couldn't swear to that.

Q. Had the clearing on that particular section been completed when you left?

A. The two units had met and we completed it.

Q. At the time you reported for work on that area of the [466] pipeline clearing job do you know of any difficulties that were being encountered by cats belonging to Tope in the area where Vincent Abbott was?

A. I heard they were in rocks and were having breakdowns. There was so much normal breakage on the dozers going up there but that they couldn't see in the snow—what was under it.

Q. Do you recall what the weather temperatures were at that time?

A. Fairly close, yes. They ranged from—well, from zero to 35 to 40 below while I was down there—maybe 45. I do know it was pretty crumpy—cold—there for a while.

Q. Where had you been employed prior to going on this job?

A. Directly prior to that I had been working for M-K.

Q. Where were you employed and what were your duties on that job?

A. I was equipment foreman at Eielson.

Q. How long were you on that job?

(Deposition of Sterling L. Allred.)

A. On that job. Oh, about four months, I guess, three or four months.

Q. How long had you been with M-K?

A. Oh, off and on. That particular time just about four months, I guess. I came down from Barrow and went to work for them.

Q. How long were you employed in Barrow? You mean Point Barrow? [467]

A. Yes.

Q. What were your duties there?

A. Heavy equipment foreman.

Q. How long were you in that area?

A. I first went up there in '46. I had been up there about seven years, I guess.

Q. I will ask you whether or not at the time you were employed by Mr. Crawford you were instructed that—to the effect that you were working for Oaks under Vincent Abbott and that Tope had no jurisdiction over you whatsoever?

A. That's right.

Q. (By Mr. Dunn): I object as leading."

Mr. Dunn: I make the same objection.

The Court: It was leading.

Mr. Nesbett: Yes, sir.

"Q. I will phrase it like this. What, if anything, did Roy Crawford tell you with respect to Tope and his jurisdiction over the area you were to work on?

Q. (By Mr. Dunn): Same objection."

Mr. Dunn: I make it again.

The Court: I think he should answer that.

Mr. Nesbett (Reading):

"A. The only thing—my instructions when they

(Deposition of Sterling L. Allred.)

hired me was to report to Vincent Abbott and they said Tope had had a contract but they didn't think that he could finish and [468] that 'Tope has nothing to do with you.' 'Go down there and work for Vincent Abbott.' They also said to 'Wait here until this afternoon' sometime as 'We have to get a pickup and send it down there and you can take it with you' which I didn't do and I drove my own car down there that same night.

Mr. Nesbett: That's all."

Mr. Nesbett: Mr. Dunn maybe wants to read the cross-examination?

Mr. Dunn: I would rather you read it.

Mr. Nesbett (Reading):

"Cross-Examination

By Mr. Dunn:

Q. What is your address, Mr. Allred?

A. 812 - 8th in Fairbanks.

Q. Do you have a phone there?

A. Yes—4616.

Q. You are a resident of Fairbanks?

A. Yes.

Q. How old are you, please? A. 47.

Q. Did you tell us on direct examination that you worked for Oaks on the pipeline job from late February, 1954, until sometime in April of the same year?"

The Court: Now did I understand from that that he worked from February to April?

(Deposition of Sterling L. Allred.)

Mr. Nesbett: Well I read it just as it reads here, your Honor. [469]

The Court: Very well.

Mr. Nesbett (Continued reading):

“A. Yes.

Q. That is correct? That is what you said?

A. I didn't say, no, but it would be because I didn't remain down there.

Q. Why did you leave the job, Mr. Allred?

A. I left the job to go back to work for M-K—to my previous job.

Q. Did you have any difficulty that occasioned your leaving? A. None.

Q. Did you get along all right with Oaks?

A. Yes.

Q. With Crawford? A. Yes.

Q. With Abbott? A. Yes.

Q. Did you get along all right with Hager?

A. Yes.

Q. Did you or did you not testify on direct examination that your position was that of equipment foreman? A. Yes.

Q. What does an equipment foreman do?

A. Well, it would be a ground foreman. You are over the caterpillars and the tractors.

Q. You would be over them, you mean? You direct their work? A. Yes.

Q. Now, as equipment foreman over what caterpillars did you have control? [470]

A. I had control over the rental cats. Some that were rented from McLaughlin.

(Deposition of Sterling L. Allred.)

Q. Now, did you testify on direct examination that the area over which you worked was that between the Halfway House and Big Delta?

A. Primarily it was but we didn't stop there. We turned around and went back.

Q. Will you define that area or areas over which you worked, please?

A. When we completed the area from Halfway House to Big Delta, then we brought the cats back and went on to meet Tope's cats coming from the south.

Q. What were these cats over which you had control doing?

A. Clearing—clearing for the pipeline.

Q. Clearing right-of-way? A. Yes.

Q. After you finished this area between Halfway House and Big Delta and moved so as to work toward Tope, how much uncleared land was there, to the best of your recollection, between you and Tope?

A. Well, they were just by Dot Lake and we took the end at Halfway House and went back to them. That was my assignment. We tied in about five miles north of Dot Lake. That was where the two units met.

Q. Then you began—is this correct—then you began moving south toward Tope from Halfway House? [471]

A. No, no. We began moving north toward Big Delta.

Q. Let me rephrase it. Everything I am asking

(Deposition of Sterling L. Allred.)

now relates to the time subsequent to the work between Halfway House and Big Delta. After you finished that do I understand that you started at Halfway House and worked toward Tope?

A. Yes.

Q. What direction? A. South.

Q. Where was Tope when you began?

A. At Dot Lake.

Q. What direction was he working?

A. He was working north.

Q. What was the distance between Dot Lake and Halfway House?

A. That would take some—I would say the mileage is about 25 or 30 miles. I don't make that as a correct answer because I don't really know. I don't recall the station numbers.

Q. But it is your best recollection it is 25 to 30 miles, approximately?

A. Yes, approximately.

Q. When did you begin working toward Tope? About how long before you left the job?

A. About two or three weeks before I left the job.

Q. After you met Tope, is that when you left and went to work for Morrison-Knudsen?

A. That's right. [472]

Q. What is the distance, as best you recall it, Mr. Allred, between Halfway House and Big Delta?

A. Well, let's see—I would say between forty and fifty miles.

Q. What was the most northern point of the

(Deposition of Sterling L. Allred.)

work allotted to Tope? A. Big Delta.

Q. Big Delta?

A. Yes, and one time there was plans to go on up to the Tanana River but they changed that when we got there and turned us around.

Q. From the period of late February until sometime in April, 1954, now, the time you were on this job, how often did you see Tope? How many times?

A. Sometimes two or three times a week he would come by there and sometimes every day.

Q. What do you think that would average out?

A. Well, I would say it would average out at least four times a week, that is, to talk to. He always stopped when he came by if he saw me—if I was out on the road and I generally was.

Q. So you saw him about four times a week to talk to? A. Yes.

Q. About how long would you spend with him?

A. Oh, sometimes we would just exchange a greeting and [473] sometimes if I had some trouble, such as needing repair parts I would tell him and he would take a message on them.

Q. Then they were brief conversations?

A. Yes, they were brief conversations.

Q. Would you say they were ten minutes long or shorter?

A. I would say ten or fifteen minutes was about average, until we got to Dot Lake and then Tope and I would have coffee. I used to go up there to eat and we would have lunch together.

Q. Well, now, did you include those coffee breaks

(Deposition of Sterling L. Allred.)

and lunch meetings with Tope in your estimate of meetings four or five times a week? A. No.

Q. Now, does the job of equipment foreman, Mr. Allred, require pretty much your full time in the immediate vicinity of the cats that you control?

A. Yes.

Q. You have to keep in touch with them?

A. You have to keep in touch with them and especially on a job like that because you've got them strung out. A man could get hurt with a falling tree or have a breakdown and you have to get him help if he needs help.

Q. You are an experienced foreman?

A. Yes.

Q. Am I then correct in assuming that when you were on this job, in your working hours, your time was spent with your [474] cats?

A. Yes, they were. You have a lot of bird dogging to do there and sometimes you have to run down parts yourself.

Q. Did Crawford or anyone else in Oaks' employ tell you that you were to boss Tope?

A. Boss Tope?

Q. Yes. A. No.

Q. Did you have any jurisdiction over Tope at all?

A. No, I didn't but I was told I would take my orders from Vince Abbott is all.

Q. I understand that. Now, did you testify on direct examination that you were an equipment

(Deposition of Sterling L. Allred.)

foreman at Pt. Barrow, Alaska, for about seven years? A. Yes.

Q. Were you working for M-K there?

A. No.

Q. Who were you working for then?

A. Two—in fact two different outfits, Arctic Contractors, when I went up there in 1946 on oil exploration.

Q. What were you doing for them?

A. The same.

Q. Clearing right of way?

A. No, no, moving freight.

Q. And who else did you work for at Barrow?

A. Puget Sound Drake and also Drake Puget Sound.

Q. What type of work were you doing as equipment foreman? [475]

A. Building runways and also moving freight.

Q. (By Mr. Dunn): I see. No further questions.

Redirect Examination

By Mr. Nesbett:

Q. Mr. Allred, do you know whether or not any instructions were given with respect to using the McLaughlin cats in the area of Dot Lake?

A. I heard that at one time when I first went down there—that they were not supposed to be put up on the rocks and when we got back at Halfway House I asked that question myself because we

(Deposition of Sterling L. Allred.)

were getting into them and they said there was no difference, that Mr. Abbott just put them in there.

Q. By the time you worked up into the area had the 'snow melted any?

A. Yes, it went down an awful lot, but we didn't get very much of the rocks.

Q. (By Mr. Nesbett): No further questions. One more thing.

Q. What are your plans for the next month, Mr. Allred?

A. They are not definite. I think I will be sent up at Bethel but that is a supposition. If I can, I am going back to Fairbanks and go out on the Clear job. That is my plan but the best laid plans do not always work out and a construction man goes where it is.

Q. If we do not contact you——

(A short discussion was held off the record.)" [476]

The Court: The rest is not important, concerning the signature of the deposition.

Mr. Dunn: That is right.

Mr. Nesbett: I offer that in evidence, of course subject to checking the rule if—and if your Honor wants to withhold the ruling on it.

The Court: Well, no. I am going to, upon his testimony, it shows he lives at Fairbanks. Now Fairbanks is a long distance from here and you would have a right to take his deposition and more—

over he understood that there was sort of an agreement that it might be read in evidence. My only inquiry was that if he is in Anchorage and here why of course it would be proper to call him.

Mr. Dunn: Your Honor, I am going to have to comment for the sake of the record to the effect that there is no agreement that it would be——

The Court: Very well. There is no agreement then. We'll understand that.

Mr. Nesbett: That would be Exhibit——

Deputy Clerk: 10.

Mr. Dunn: 10?

Deputy Clerk: 10.

Mr. Nesbett: Your Honor—I took the deposition of Mr. William Olday a long time ago and Mr. Olday resides in Anchorage, and I was depending upon him to be available when I [477] called him here as a witness. I have a subpoena out for him. I have not been able to locate him. I expect to have him by the time I had published this deposition. He is not here. From Mr. Dunn's stand on the deposition of Allred, I assume that he wouldn't agree that we could use the deposition of Olday. Is that correct?

Mr. Dunn: Well, Mr. Nesbett, I don't care too much about Mr. Allred's deposition really. I was trying to merely inform the Court as to our rules here and see what he wanted. But Mr. Olday, before I made any statement on that I'd want to review that deposition. I believe I would want Mr. Olday on the stand, if he is available.

Mr. Nesbett: Well, I have a subpoena out for

him and I fully expect to have him here, and if it would be agreed that I could put him on, it would be a short testimony out of order, and we could go ahead with the case that——

The Court: That is you mean that you would rest with the understanding that you might be able to put him on the stand if you can get him?

Mr. Nesbett: When I can find him, yes, sir.

The Court: What do you say, Mr. Dunn?

Mr. Dunn: I don't see how it is going to do any harm. It might even help.

The Court: I don't either, so would you be willing to go on with your case then, and if he comes, why put him on. [478] That gives you then every opportunity that you might want. Very well. Court stands recessed for five minutes.

(The Court recessed at 11:30 a.m.; reconvened at 11:35 a.m.)

The Court: Gentlemen, are you ready to proceed?

Mr. Nesbett: Yes, sir. Your Honor, Mr. Harlan stopped me in the hall during the recess and says he remembers something about those two checks. I wonder if I could put him on?

The Court: Of course those two check are wholly unimportant here, whether it was l-a-n or l-a-n-d. It is wholly unimportant. However you may put him on if he is here. I assume that he was paid or otherwise he would be making a claim.

Mr. Nesbett: Well he has filed that suit.

The Court: Is that—Are these checks included in that suit, the amount of them?

Mr. Nesbett: No. He will tell you, your Honor, what he thinks those checks are for. I wanted—I didn't want the Court to be left with the impression unless it was the truth that he had been paid for this time that he said he hadn't been paid for.

The Court: Well my judgment was that he had been paid, that he didn't remember. He said he had signed the checks, one of the signatures looked like his signature, so I think that he was paid.

Mr. Dunn: Your Honor, I would like to comment on that.

The Court: Well let's not comment on it. Let's find [479] out what he has.

(Mr. Harlan resumed the witness stand.)

ARTHUR J. HARLAN

Redirect Examination

By Mr. Nesbett:

Q. Mr. Harlan, did you talk to me in the recess? A. I did.

Q. Did you state then you had some recollection of what those two checks that you apparently received were for, Exhibits M and N?

A. I remember what one of them was for.

Q. Which one?

A. The first one that was dated in January.

Q. Would that be Exhibit M, dated January 30th of '54, for \$80.15?

(Testimony of Arthur J. Harlan.)

A. I believe it would. I would know it if I would see the check.

Q. Was that the check in payment for any of the work you did, that you testified you did, for example three days on it as a cat operator or the six days you worked repairing the cat?

A. No. A short time before I worked on it those three days on the cats, why Mr. Tope borrowed a truck that belonged to the Lodge there. It was an International flat bed truck and I went to Valdez looking for some 2" wire cable, I think it was, and that was supposed to be McLaughlin's camp down there and I put in two days. [480]

Q. And is that in your opinion payment for your trip to Valdez and the work you did in connection with the cable?

A. Yes. That is payment on that.

Q. You don't recall what the check in February 6th for \$47.00 was for? A. No, I don't recall.

Mr. Nesbett: That's all, your Honor.

Mr. Dunn: No questions, your Honor.

Mr. Nesbett: Your Honor, could I offer in evidence a telegram addressed to me from Director of Finance at Juneau, concerning the corporation standing of Stuart Construction Company, concerning annual reports?

The Court: What do you say about it?

Mr. Dunn: First I would like to see it first, your Honor. It is true, of course, Mr. Nesbett, that this is in answer to a wire that you sent, is it not?

Mr. Nesbett: It is an answer to a wire and letter, yes, the letter enclosing as a matter of fact the two reports that were not—had been—had not been made, which is conceded.

Mr. Dunn: I don't doubt the fact that this was received from the Department of Finance and of course its contents are obvious to the Court to the effect that these annual reports had been filed but it says they're on today's plane. I would think it—that is the receipt for the filing, I would think they would be the better evidence and they'll be here and then I object to [481] any admission of curing of this defect during the course of the trial or an attempt to cure it.

The Court: Objection is made to that form of proof; I would have to sustain the objection.

Mr. Dunn: Your Honor, I don't object to the form of the proof.

The Court: Don't you?

Mr. Dunn: No, I do not, not to the form, but I object to the offering of any evidence on the ground of relevancy in the light of our Territorial Statute to cure the defect that has already been established.

The Court: If you don't object to the form, then the objection is overruled.

Mr. Nesbett: Mr. Dunn's stand, I believe, is that it doesn't legally effect cure, the effect of legal effects he made in his motion.

Mr. Dunn: That's true.

The Court: Plaintiff's Exhibit 11. What do you call your corporate director over there, Finance?

Mr. Nesbett: **Director of Finance.**

The Court: They supervise the corporate entity?

Mr. Nesbett: Yes.

Mr. Dunn: Well, your Honor, now that that is in I think it is proper to demand a copy of these annual reports so that they may be inspected. [482]

The Court: Well, are they available?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. Are you ready to proceed with your case then I understand—Are they in the court room?

Mr. Nesbett: Does he want the records now, or rather the reports?

Mr. Dunn: If you would, Mr. Nesbett, if you would leave those and attach returns available, with the Clerk, for inspection after we adjourn or recess for noon, I would appreciate it.

The Court: As I understand, Mr. Nesbett, you rest with the right, and you do not object to putting Mr. Olday on if he should appear.

Mr. Dunn: I have no objection.

The Court: Very well.

Mr. Dunn: With him being put on out of order.

The Court: Very well, the plaintiff rests conditionally. Are you ready to go forward?

Mr. Dunn: Yes, sir. My first witness will be Mr. Harris Hancock, your Honor.

The Court: You may call Mr. Hancock.

WILLIAM HARRIS HANCOCK

being first duly sworn upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please? [483]

A. My name is William Harris Hancock.

Q. Where do you live, Mr. Hancock?

A. On the Seward Highway, Mile 9.

Q. Just outside of Anchorage here?

A. That is correct.

Q. Are you familiar with the parties to this action, namely, Stuart Construction Company, Stuart E. Tope, the partnership of Oaks Construction Company and, I believe, it is Williams Brothers, McLaughlin and Marwell are also named?

A. Yes; I am.

Q. Did you ever have any relationship to Oaks Construction Company?

A. Yes.

Q. What was that?

A. I was office manager.

Q. During what period, please?

A. From June, 1953, until July of 1955.

Q. Did you do any accounting work in connection with your duties as office manager?

A. I did.

Q. Who kept the accounts of Oaks Construction Company?

A. I did.

Q. Were all accounting matters of Oaks Construction Company handled by you or under your supervision??

A. Yes. [484]

Q. Are you acquainted with this Haines pipe-

(Testimony of William Harris Hancock.)

line job and particularly with that section of it, the right of way clearing of which was subcontracted to Stuart Construction Company? A. Yes.

Q. Did you ever have occasion to do any accounting in connection with that particular section of a line in that particular work? A. Yes.

Q. Mr. Hancock, I hand you this instrument and ask you if you can identify the same?

A. Yes; I can.

Q. What is it, please?

A. This is a statement of the account of Oaks Construction Company-Stuart Construction Company on the pipeline clearing work.

Q. Is that a complete accounting?

A. Yes; it is.

Q. And does that show any monies due from one person to another? A. Yes; it does.

Q. What does it show in that respect?

A. It shows that our records indicate \$37,498.64 as being due Oaks Construction Company from Stuart Construction Company.

Q. Did you ever make a similar accounting wherein you showed that amount owing as being \$38,080.82? A. I did. [485]

The Court: What were the figures you give, Mr. Dunn?

Mr. Dunn: It is the figures, your Honor, in paragraph 9 of my counterclaim, \$38,080.82.

Q. Which is correct, the \$38,000 odd figure or the \$37,000 odd dollar figure evidenced by the instrument you have in front of you?

(Testimony of William Harris Hancock.)

A. The \$37,000 figure is correct.

Q. The \$38,000 figure had to be adjusted, I take it? A. That's right.

Q. Now, what items are covered—well, no—strike that question. This is a complete accounting, is it not? A. Yes, sir.

Q. And are there a number of schedules attached? A. Yes.

Q. And what are those schedules?

A. The schedules consist of first one detailing the earnings——

Q. Well, are the schedules merely breaking down into detail the main items set forth on the sheet there? A. That is correct.

Mr. Dunn: Your Honor, I would like to offer that into evidence. I have a copy here for Mr. Nesbett if he'd like it.

Mr. Nesbett: I have no objection, your Honor.

The Court: Very well. Plaintiff's Exhibit O—Defendant's Exhibit O.

Q. I now hand you Defendant's Exhibit O, Mr. Hancock, and [486] invite your attention to the last notation on the first page. Will you read that, please?

A. "Schedule B is gross payroll. The compilation of schedule B is set forth in Schedule A, following Schedule B; Schedule A following Schedule A-1 compiles the net payrolls, monies actually given the men after deductions from the earnings."

Q. Did you request me to make an addendum?

A. I did.

(Testimony of William Harris Hancock.)

Q. Is that addendum correct?

A. Yes, sir.

Q. Now, will you check Exhibit O and see that Schedules A and B and A, prime, are properly identified?

A. Yes; they are.

Q. From what source did you extract the information to compute plaintiff's—excuse me, to compute Defendant's Exhibit O?

A. That's from the books of Oaks Construction Company.

Q. Only the books?

A. All the pertinent records of the company.

Q. Were those records and books that were kept in the ordinary course of business?

A. That is correct.

Q. Now, then, Mr. Hancock, I ask you whether or not you ever had occasion to make a compilation of the operating time of the caterpillar tractors that were used by Stuart Construction Company in the course of its work? [487]

A. Yes; we did.

Q. Now, I hand you this instrument and ask you if you can identify the same?

A. Yes; I can.

Q. What is it?

A. This is a compilation of the hours that the cats worked, taken from the records sent to us from the job.

Q. The records kept in the ordinary course of business?

A. That is correct.

Q. Did those same records also show the num-

(Testimony of William Harris Hancock.)

ber of hours worked by the men who operated those same cats? A. Yes.

Q. Is there any discrepancy between the two? Any difference between the two?

A. There would certainly be——

Q. Did the cat operators get paid irrespective of whether or not the cat broke down?

A. I presume they did.

Q. According to your records they did?

A. We have more hours paid for cat operators than we have operated hours of the cats by our records.

Q. Now, I ask you whether or not this compilation shows the reason for the breakdown or what was wrong with the cat when it broke down?

A. Yes; it does. [488]

Q. Was that information taken from the same records? A. Yes.

Q. And did you prepare this compilation?

A. It was prepared under my supervision.

Q. Do you know if it is accurate?

A. Yes.

Q. Is it? A. Yes.

Q. Now, I ask you whether or not that compilation was prepared for the—for use in this lawsuit? A. No.

Q. Do you know when it was prepared?

A. Yes.

Mr. Dunn: I would like to offer this compilation, your Honor, when Mr. Nesbett is through with it. Will you bear with me a moment, please?

(Testimony of William Harris Hancock.)

The Court: Yes, sir. Mr. Dunn, unless there is an emergency, could we suspend until 2:00 o'clock?

Mr. Dunn: Yes, sir. I would like to get this marked if I could.

The Court: Very well.

Q. How many cats does that compilation cover?

A. Three.

Q. Those are the three cats that Tope had on the job?

A. Stuart Construction Company had. [489]

Mr. Nesbett: May I ask that it be marked for identification only, your Honor?

The Court: Yes. For the Defendant, it is Defendant's Exhibit P, I believe.

Deputy Clerk: That's right.

The Court: Well, then, gentlemen, I have another matter here and this case will be suspended until 2:00 o'clock this afternoon. [490]

Afternoon Session

The Court: Gentlemen, are you ready to proceed with the case on trial? You had a witness on the stand, Mr. Dunn.

(Mr. Hancock resumed the stand.)

Mr. Dunn: Yes, your Honor.

The Court: The last exhibit was P?

Mr. Dunn: That was for identification, I believe, your Honor.

The Court: P has reference to the time that was used by this equipment, I understood.

(Testimony of William Harris Hancock.)

Q. (By Mr. Dunn): Mr. Hancock, I hand you Defendant's Exhibit O and call your attention to the first page and ask you the following questions: Under that accounting, how much money was earned by Stuart Construction Company?

A. Thirty-three thousand three hundred thirty-five dollars and forty-seven cents.

Q. Now, was any part of that cat rental?

A. Yes.

Q. How much?

A. One thousand one hundred twenty-five dollars.

Q. Now, that's included in the thirty-three thousand and some odd dollars? [491]

The Court: How much rental?

A. One thousand one hundred twenty-five dollars.

Q. What was that rental based on?

A. Based on eighteen dollars an hour, at the time authorized.

Q. Time authorized for what?

A. For extra work.

Q. What do you mean by "extra"?

A. Work that was not included in the price paid for lineal foot of clearing; such work was authorized by Oaks Construction Company supervisory personnel on the job.

Q. Is that beyond the contract?

A. The contract indicated an eighteen-dollar-an-hour would be paid for such work, if and when authorized.

(Testimony of William Harris Hancock.)

Q. This is a contract to December 17, 1953, that you are talking about?

A. I believe that is the date of Stuart Construction Company.

Q. And that cat rental is merely in accordance with the provisions of the contract?

A. That is correct.

Q. Now, I ask you, according to this accounting, how much money was advanced by Oaks Construction [492] Company in total?

A. Seventy thousand, eight hundred thirty-four dollars and eleven cents.

Q. Was that money paid, do you know?

A. Yes.

Q. How much of that seventy thousand dollars, odd dollars, consisted of payroll?

A. Twenty-seven thousand, four hundred thirty-one dollars and ninety-eight cents.

Q. How much of that money advanced by Oaks Construction Company consisted of equipment rentals?

A. Twenty-two thousand, one hundred forty-nine dollars and eighty cents.

Q. Now, do you know to what equipment that refers? A. Yes.

Q. Generally? A. Yes.

Q. What?

A. The largest amount of it was for rental of extra cats.

Q. You mean cats other than those of Stuart Construction Company or Tope?

(Testimony of William Harris Hancock.)

A. That is correct.

Q. Was any part of that seventy thousand odd dollars [493] paid to the Northern Commercial Company? A. Yes.

Q. How much?

A. Approximately ten thousand dollars, well, the figure is ten thousand, seven hundred ninety-eight dollars and forty-seven cents.

Q. That's the exact figure, is it not?

A. That is correct.

Q. Do you know whether or not that was in accordance with the settlement that was negotiated with N. C. Company by Oaks?

A. Yes; it was.

Q. How much of that seventy thousand odd dollars was for meals and lodging?

A. One thousand, four hundred fifty-two dollars and eighty-six cents.

Q. How much of that seventy thousand odd dollars was for fuel oil and gas, oil and things of that nature?

A. Six thousand four hundred eighty-two dollars and twenty-two cents.

Q. And how much of that same seventy thousand odd dollar figure was for miscellaneous repair parts?

A. Two thousand five hundred eighteen [494] dollars and seventy-eight cents.

Q. Now, you testified that that entire sum has been paid by Oaks Construction Company, did you not? A. Yes.

(Testimony of William Harris Hancock.)

Q. Now, do you know whether or not of your own personal knowledge, now, there exists accounts, indebtedness incurred by Stuart Construction Company in connection with this pipeline job, that were not paid by Oaks Construction Company?

A. I do.

Q. Are one or more of those accounts included in this seventy thousand odd dollar figure that you testified Oaks, in fact, has paid?

A. I don't understand your question, Mr. Dunn.

Q. Are any of these unpaid accounts included in this seventy thousand odd dollar figure you are shown on Plaintiff's—Defendant's Exhibit O?

A. No; they are not.

Q. Are you acquainted with a three thousand dollar check given either Mr. Bayless or Franklin Mining Company, in connection with this pipeline job?

A. Yes.

Q. Is that three thousand dollar check [495] included in that seventy thousand odd dollar figure?

A. No.

Q. Now, I hand you this instrument, after showing it first to counsel; Mr. Hancock, I hand you this paper and ask you whether or not you prepared that?

A. Yes; I did.

Q. Is that your handwriting?

A. That is correct.

Q. Now, using that to refresh your memory, do you know, or can you tell the Court of any other accounts of Stuart Construction Company that were incurred in connection with this pipeline job

(Testimony of William Harris Hancock.)

that have not been paid by Oaks, and that are not included in that seventy thousand odd dollar figure?

A. Yes.

Q. Will you do so, please?

A. I have listed here, accounts that were called to the attention of Oaks Construction Company by creditors of Stuart Construction Company, and which I did not take into the obligations of Oaks Construction Company, because they were not recognized by us as being some that we should pay: Miller and Bently Equipment [496] Company in Fairbanks, L & B Company Welding of Anchorage, Yukon Equipment Company in Fairbanks, Northern Commercial Company, Anchorage, Hyke Transfer Service in Copper Center, The Alaska Road Commission, Tok Junction, and Alaska Chemical Company in Fairbanks. And in addition the three thousand dollar check to Franklin Mining, Howard Bayless was holding.

Q. Well, now, Mr. Hancock, are you personally familiar with the pleadings in this action; by that I mean the complaint and the answer and counterclaim and so on? A. I am.

Q. Do you know whether or not Oaks Construction counterclaimed for various damages, based upon an alleged unauthorized pledging by Stuart Construction Company of the Tope—of the credit of Oaks Construction Company and for generally jeopardizing the credit rating of Oaks Construction Company?

(Testimony of William Harris Hancock.)

A. I don't understand your question fully, Mr. Dunn.

Q. Do you know whether or not in a counter-claim in this action, Oaks Construction Company claims damages based on an allegation of Stuart Construction Company or Stuart E. Tope [497] without authorization, pledged a credit of Oaks Construction Company and injured the credit standing of Oaks Construction Company?

A. Yes; I believe that is in the——

Q. Now, I hand you a number of items of correspondence and I caution you not to testify as to the contents of these items of correspondence; I want you to use them merely to—well, first, I ask you whether or not these are papers that were kept in the ordinary course of business of Oaks Construction Company? A. Yes; they are.

Q. Now, I want you to use those papers to refresh your memory, in order to answer this question, and the questions: Do you know of any accounts of Stuart Construction Company for which payment has been made on Oaks Construction Company, of Oaks Construction Company?

A. Your question is not clear to me, Mr. Dunn.

Q. Do you know any creditors of Stuart Construction Company who had demanded payment from Oaks Construction Company for the bills of Stuart Construction Company, incurred in connection with this pipeline job?

A. Who have not been paid, is that the ones you [498] want to know?

(Testimony of William Harris Hancock.)

Q. Well, either paid or unpaid that have not already been mentioned?

A. I am confused by your question; I am sorry, Mr. Dunn.

The Court: The question is, as I understand it, any bills of the plaintiff been propounded against the defendant, against Oaks?

Mr. Dunn: Yes, sir.

Q. (By Mr. Dunn): Do you know of bills of the plaintiff that have been propounded against the defendant? A. Yes.

Q. That have not been mentioned?

A. No; I mentioned those that I am aware of.

Q. All right.

The Court: How much were those accounts? I take it the accounts you read there from the paper were the claims against what you say is plaintiff's, and demand has been made upon your Company?

A. That is right.

The Court: What is the total of those?

A. I have a total here of fifteen thousand, one hundred thirty-four dollars and ninety-one [499] cents.

The Court: Does that include the three thousand and twenty-nine—the check that was drawn?

A. The three thousand figure was what I have used.

The Court: I see.

Mr. Nesbett: That included the Bayless check?

A. That is correct.

(Testimony of William Harris Hancock.)

The Court: He put that in, three thousand dollars, he said.

Q. (By Mr. Dunn): Well, throughout the course of this work, did various creditors of Stuart Construction Company or Stuart E. Tope make demand for payment on Oaks Construction Company? A. Yes.

Q. Can you name any of those creditors that haven't already been mentioned? You may use these papers to refresh your memory.

A. Northern Commercial Company, Tok Lodge, C. A. Bicknell, operating as maintenance service, and also Williams Brothers as prime contractor.

Q. Is that all you can think of?

A. I believe the rest have all been mentioned.

Q. What about the Half-Way House, did they make [500] any demand on you?

A. I don't recall.

Q. May I have Exhibit P, please?

Mr. Nesbett, have you had a chance to examine the copy of Exhibit P that I gave you?

Mr. Nesbett: I examined the addendum to a letter that you said was the same, and I suggested before lunch that I wanted to ask the witness a few questions before this was admitted as an exhibit, Exhibit P into evidence.

Mr. Dunn: Well, I would like to have him proceed on that, if I may, so I can get that in.

The Court: Counsel is right about asking questions on voir dire.

Q. (By Mr. Nesbett): Mr. Hancock, I'll hand

(Testimony of William Harris Hancock.)

you Exhibit P so you will be able to look at it. I believe you said you prepared that, did you not?

A. Yes, or I had it caused to be prepared in my office.

Q. And is that when you were employed by Oaks? A. That is correct.

Q. You aren't with them now, are you?

A. No. [501]

Q. When did you have it prepared?

A. I don't know the exact date.

Q. Approximately?

A. I believe about the middle of April.

Q. Of which year? A. Of 1954.

Q. 1954? A. Yes.

Q. Middle of April? A. Yes.

Q. Did you state in response to a question by Mr. Dunn, what you used as a basis to compile these figures? A. I believe I did.

Q. What did you use?

A. Original records of the job that were supplied to me.

Q. And in what form were those original records?

A. Either in foreman's reports, equipment reports, or time cards.

Q. And would that be foreman's reports, equipment reports or time cards that came down from this particular pipeline job, that is the Tope project? A. Yes. [502]

Q. Were those—were there three different types

(Testimony of William Harris Hancock.)

of reports that you used in order to compile this Exhibit P?

A. No; the time cards were connected—with perforated card with equipment on one section and the operator's time on the other section. The foreman's part summarized the labor element and the equipment part summarized the equipment hours.

Q. And were those cards in Oaks Construction Company's possession at the time you prepared this? A. That is correct.

Q. And they were forwarded to you by the foreman on the job, is that right?

A. That is right.

Q. And would that be Hager or the other foreman that was there?

Q. Whoever we had in a supervisory capacity at the time; it changed.

Q. Do you know where those cards are now?

A. I do not.

Q. Was the time and the equipment all on the same card?

A. It was a perforated card that was [503] later separated for our own use.

Q. Perforated card that was separated, do you mean the time section was separated from the equipment section and so forth?

A. The payroll section was separated from the equipment section.

Q. And was the perforated card perforated by the foreman before it was forwarded to you, or——

A. No.

(Testimony of William Harris Hancock.)

Q. Was it—were the records on those cards written out in figures and handwriting by the foreman?

A. They would normally be written by the operator.

Q. The operator? A. That is correct.

Q. The IBM operator, machine operator, you mean? A. No; the cat operator.

Q. Oh, what part would the cat operator take in—

A. Each employee turned in his time card.

Q. That would be as to the time for that particular employee, sir? A. That is correct.

Q. He would turn that card into the foreman, would he? A. That is right.

Q. And what would the foreman do in the [504] ordinary routine?

A. Once a week he would forward those to our office.

Q. Forward all the employees' cards?

A. That is right.

Q. Time reports? A. Yes.

Q. Now, who turned in the time on the equipment though?

A. The same procedure would follow.

Q. Same procedure; do you mean the cat operator would turn into the foreman, the number of hours the equipment was used? A. Yes.

Q. And then the foreman would do what?

A. He would transmit those to the office manager.

(Testimony of William Harris Hancock.)

Q. The same records that the operator gave him were transmitted down to you?

A. That is right.

Q. And you had all those records when you prepared these figures? A. Yes.

Q. The—looking at Exhibit P, for example, take any given date that shows under the column, “Hours Worked,” a figure and then again another figure under the column entitled, “Hours Down,” do [505] you know, would that indicate figures put on those cards by the cat operators to show how many hours on that day the cat was operated by the operator? A. Yes.

Q. And then the other figure, if there is a figure under the “Hours Down” column, would indicate the cat operator’s report as to the number of hours that cat was out of action on that date, is that correct? A. Yes.

Q. Then, what sort of day was used as a basis in computing the number of hours available for use? For example, how many hours a day were considered as a basis?

A. Without reference to the record, I can’t tell you that. The payroll records speak for themselves on that point.

Q. The payroll records, but Mr.—I am thinking of the equipment record proportion, that is all this purports to show is the hours the equipment was used or the hours it was down. And didn’t you say the sections, perforated sections were torn apart as to the equipment and the man’s time? [506]

(Testimony of William Harris Hancock.)

A. Yes.

Q. Well, then, wouldn't the equipment portion of the card show the hours in operation and the hours out of operation? A. Yes.

Q. And don't you know what number of hours was used as a basis for determining the availability of the equipment, for example, on the job?

A. It would be the normal work day that was in effect at the time we are talking about.

Q. I see. Then, if a normal working day was a nine-hour working day, you would take that nine and divide it between the hours the equipment operated and the number of hours out of nine that it was not operating, correct? A. Yes.

Q. And that would be on the equipment cards?

A. Yes.

Q. And that would be—those figures would have been prepared by the cat operator himself, is that right? A. Yes.

Q. And given to the foreman or superintendent?

A. Yes.

Q. And forwarded down to you? [507]

A. Yes.

Q. And those cards should be in Oaks' file somewhere, should they not?

A. They should be.

Q. When did you leave Oaks Construction Company? A. July of 1955.

Q. And were those cards there at that time?

A. Yes.

Q. Have you—you have had no occasion to look

(Testimony of William Harris Hancock.)

for them since you prepared these figures, is that correct? A. No; that is not correct.

Q. That is not correct?

A. I have looked for them.

Q. Oh, you have looked for them. When did you look for them? A. Yesterday.

Q. I see. Well, were you able to find them?

A. No.

Q. Did you look in all the old correspondence and file cabinets that used to be there when you were working there?

A. That is not possible.

Mr. Nesbett: Well, your Honor, I was hoping, as a matter of fact, those cards [508] could be found; I think they would be the best evidence, because, of course, this is going to be an important point in this case.

The Court: Have you made a computation from the plaintiff's viewpoint, as——

Mr. Nesbett: I have made a rough computation during the noon hour, your Honor, and it puts us quite a ways apart here on the number of hours worked. Of course, Mr. Tope, all he had to go on was Oaks' records as to the men, the hours the men were paid and he has gone at it from that approach. This, of course, creates a wide difference.

The Court: Well, now, do I understand that this figure of eighteen dollars per hour was kept on all that equipment during the whole time, notwithstanding the contract? There was a statement here that some of it was for extra time used by

(Testimony of William Harris Hancock.)

the equipment, not what had been determined in the contract. For instance, the one thousand dollars—I don't know if I can put my finger—oh, yes, he said eleven hundred twenty-five dollars for rental of equipment. Well, however you bring that out [509] I have notes here that there was some rental equipment and the question was, what was that, and it was eighteen dollars for extra time under the contract.

Mr. Nesbett: Well, your Honor, I think that will become clear to you; I can see where it is confusing, but Mr. Hancock has gone ahead and prepared all this based on the fact that there was a contract in existence and all charges against that work are rightfully against Stuart Construction Company.

The Court: Yes; that is what I understood.

Mr. Nesbett: Well, now, that contract provided that if it was required during the clearance that the operator or the contractor move some of the clearance debris farther away from the right of way than he ordinarily would for some particular reason, fire hazard or something else, they then were to get eighteen dollars an hour for cat time, and that is how they come to the figure of eleven hundred and twenty-five dollars, for extra cat time used for those purposes; that is what I have an idea—— [510]

The Court: You might ask him if he understands that?

Mr. Nesbett: Yes, but I didn't think——

(Testimony of William Harris Hancock.)

The Court: He probably did not, because he was an office manager.

Mr. Dunn: Well, I will ask him. That is where that eleven hundred twenty-five came from, isn't it?

A. That is correct,

Mr. Nesbett: I was confined, I thought, your Honor, just to this exhibit and I didn't try to go any further than that, so I object to its being admitted into evidence. I think those cards should be produced. They are important enough to be required because it does create a——

The Court: The witness says he can't do it, so we will have to use this and your computation, too, I think.

Mr. Nesbett: If your Honor please, can I ask him another question or two on that?

The Court: Yes.

Q. (By Mr. Nesbett): Did you give up looking for those cards? [511] A. Yes.

Q. Let's see now, you have been out of that office for how long? A. Since 1955, July.

Q. And has the office moved in the interval?

A. Oaks vacated the premises within a rather short period after that.

Q. Has Mr. Oaks worked with you in looking for those cards?

A. Mr. Oaks suggested where I should look to find them and called in the help of another former employee, who was directly connected with such records, and together we looked for them, unsuccessfully.

(Testimony of William Harris Hancock.)

Q. And where did you look? Where are the records now?

A. I don't know where the records are now; we looked in the Ken Hinchey Company storage buildings, where Mr. Oaks said he had had the records stored at one time.

Q. You didn't have anything to do with moving the records out of the office you worked in, did you?

A. No.

Q. Did Mr. Oaks help you to look for it or [512] just give you suggestions?

A. He gave us suggestions where to look.

Q. Well, at least, your Honor, I think the admission into evidence should be held up until we hear from Mr. Oaks on it. If this is the best there is and it can be substantiated in some fashion, we will certainly have to deal with it.

The Court: Let it be admitted and then it may be modified and the cards may show that it does not truly reflect the time used, that is the time that was used by the cats, that is by the Caterpillars. When I say "time used by them" I mean the time that they were used in this construction work.

Mr. Dunn: You say you want that to reflect that this exhibit does not truly reflect the time?

The Court: Well, according to the plaintiff, I say the plaintiff says it doesn't, I know nothing about it, I am listening to the testimony. It is the time that you have computed that they were used.

Mr. Nesbett: I wouldn't be positive to say it

(Testimony of William Harris Hancock.)

doesn't; I don't know. It is the first time [513] I have ever seen it or Mr. Tope——

The Court: I think it is competent evidence, however, that is the defendant's computation.

The Clerk: Are these admitted?

Mr. Dunn: Yes.

Q. (By Mr. Dunn): At whose request was that search for those time cards made?

A. I believe you asked me to look for them, Mr. Dunn.

Q. And in the course of looking for them, did you find any old moldy records and mushrooms growing out of them and so on? A. Yes.

Q. Can you think of any place else to look for those time cards? A. No.

Q. If you'd do, will you look for them; I would like to see them, too? A. Yes.

Q. Now, calling your attention to Defendant's Exhibit P, I ask you how many hours were worked by each of these three cats? How many hours were worked? [514]

The Court: During the whole period?

Q. Yes, as reflected by this exhibit which is the whole period.

The Court: I believe the cats didn't work, they were just used during that time?

A. We have on one cat, three hundred and forty-nine hours, and we have one hundred ninety-seven hours on another, and one hundred and seventy-seven and one-half hours on the third.

Q. Will you change the marking on that, on

(Testimony of William Harris Hancock.)

Exhibit P, to show it is no longer for identification?

The Clerk: Yes.

Q. Mr. Hancock, did you testify on being questioned by Mr. Nesbett a minute ago that that was prepared about April of 1954? A. Yes.

Q. Was a copy of it ever furnished to Northern Commercial Company? A. Yes.

Q. Do you know when that copy was furnished?

A. Approximately the same date or shortly thereafter.

Q. Now, Mr. Hancock, do you know whether or not the Stuart Construction Company ever [515] requested through your office, in your capacity as office manager, a progress payment? A. Yes.

Q. Now, I hand you Defendant's Exhibit F and ask you if you can identify it?

A. Yes; I can.

Q. What is that?

A. It is a request from—for payment for progress estimate from Stuart Construction Company, signed by Stuart Tope and approved by Roy S. Crawford.

Q. Now, was that delivered to your office in the ordinary course of business? A. Yes.

Q. And it is a request for payment on what basis?

A. On the basis of 11.2 miles of clearing at one hundred per cent completion and two miles at fifty per cent completion, which is equivalent of 64.416 lineal feet.

(Testimony of William Harris Hancock.)

Q. Based on feet then, is it not?

A. That is correct.

Q. And——

The Court: I have somewhere the date of that request; what is the date of it?

Q. February 6, 1954. [516]

The Court: Yes; that is right.

Q. In the course of your duties as office manager for Oaks Construction Company, did you ever prepare a statement of account showing the monetary relationship, from time to time, between Oaks Construction Company and Stuart Construction Company? A. Yes.

Q. I hand you this instrument—after Mr. Nesbett has looked at it—and having handed it to you, I will ask you if you can identify it?

A. Yes; I can identify this.

Q. What is it, please?

A. It is a statement of account with Stuart Construction Company as of January 31, 1954, showing earnings and back charges against——

Q. Had you made any prior to that time?

A. No.

Q. That's the first one, then?

A. This is.

The Court: This is January 31 of 1954?

Q. Yes. Well, now, according to your computation, as reflected by that statement of account, who owes who, so to speak? [517]

A. Stuart Construction Company is indebted to

(Testimony of William Harris Hancock.)

Oaks Construction Company in the amount of twenty-five hundred and twenty-five dollars.

Q. Now, that's the first statement of account?

A. Yes.

Q. I would like to offer this, please.

Mr. Nesbett: I have no objection.

Q. (By Mr. Dunn): Do you know whether or not that statement of account ever came to the attention of Stuart Construction Company?

A. I mailed it.

Q. To whom?

A. To Stuart Construction Company.

Q. Now, did you ever have an occasion, Mr. Hancock, to prepare statements of account subsequent to that? A. Yes; I did.

Q. During the—how often did you prepare them? A. Monthly.

Q. Did—was Stuart Construction Company advised of these monthly statements of account?

A. Yes.

Q. How were they advised—how was it advised?

A. They were mailed to them. [518]

Q. Now, did the picture change from month to month? A. Yes.

Q. In what way?

A. The amount of Stuart Construction Company's indebtedness to Oaks increased faster than his earnings.

Q. Well, did the amount ever decrease after the first statement of account that you prepared?

(Testimony of William Harris Hancock.)

A. No.

Q. On the contrary, did it increase every month? A. Yes.

Q. Now, the—I again hand you Defendant's O, and ask you whether or not the first page of that reflects the final statement of account.

A. Yes; it does.

Q. Did these statements of account bear any relation to each other?

A. Yes; the estimates and the back charges were compiled on accumulated basis so that the last estimate is an accumulation of all the previous ones.

Q. Terminating in Exhibit O, then?

A. Yes; correct. [519]

Q. In the summer of 1954, did you have a conversation with a Mr. Bayless, concerning a three thousand dollar NSF check? A. Yes.

Q. Did he advise of any particular antagonism towards Oaks Construction Company?

A. No.

Q. Against——

The Court: '54?

Q. '54.

May I have Exhibit 2, please? Mr. Hancock, I hand you Plaintiff's Exhibit 2 and ask you to examine it, if you will, please, until you feel that you are more or less familiar with it?

A. I have examined it.

Q. Can you tell what it is?

A. Yes; this is a schedule of costs of operation of Stuart Construction Company on their three

(Testimony of William Harris Hancock.)

cats, for work on the Oaks Construction Company contract during the year of 1954.

Q. Have you had appreciable experience in accounting-bookkeeping? A. Yes.

Q. For how many years? [520]

A. Eight years.

Q. Now, examining that statement, can you tell—here, let me, I am getting ahead of myself, excuse me, strike that. Has that been eight continuous years? A. Yes.

Q. From examining that exhibit that you now have in your hand, can you tell on what that computation is based? A. Yes.

Q. What is it based on?

A. It appears to be based on the payroll.

Q. Well, are you familiar with the practice in construction business with respect to paying cat operators or cat skimmers when their cat breaks down? A. Yes.

Q. What is the practice?

A. They're paid whether the machine can work or not.

Q. Well, then, does that exhibit, Plaintiff's Exhibit 2, tell you anything at all about the true costs of operating these cats?

A. I don't believe it does; I believe it is merely an estimate. [521]

Q. Now, inviting your attention to the same exhibit, again, I ask you if any allowance is made to that exhibit as a cost for parts?

A. No; there is not.

(Testimony of William Harris Hancock.)

Q. Did I misread it? (Checking with the witness.)

A. You are correct; I overlooked the last item on the sheet, which shows a provision for costs.

Q. I will repeat my question. Does Plaintiff's Exhibit 2 make any allowance for the expenses of repair parts? A. Yes.

Q. Does it say where those repair parts came from? A. Yes.

Q. Where?

A. Northern Commercial Company, Fairbanks, Alaska.

Q. How much of an allowance is made?

A. Three thousand two hundred thirty-two dollars and ninety-eight cents.

Q. Now, Mr. Hancock, I hand you Plaintiff's Exhibit 9, which purports to be a settlement between the Northern Commercial and Oaks, and ask you what amount of money, in accordance with the terms of that settlement, was paid N. C. Company for its parts for Stuart [522] Construction Company?

A. There is an open account item shown here of five thousand four hundred and sixty-five dollars and ninety-seven cents, which I presume to be parts.

Q. Where do you work, now, Mr. Hancock?

A. For Bashaw Equipment Company.

Q. Do you have any connection with Mr. Oaks, whatsoever? A. No.

Q. You don't work for him any more?

(Testimony of William Harris Hancock.)

A. No.

Q. Have you worked for him since you left Oaks Construction Company? A. No.

Q. And that was back in 1955? A. Yes.

Q. How long have you been connected directly or indirectly with the contracting business?

A. Since 1949.

Q. Well, during that period of time, have you formed any opinion as to the frequency or practice, whatever you want to call it, of a contractor carrying the payroll of a subcontractor? [523]

A. Yes.

Q. Do you know how often it is done?

A. It is done occasionally.

Q. Is there anything surprising about it?

A. No.

Q. Have you ever seen it before?

A. Yes.

Q. Now, as office manager for Oaks Construction Company, were you concerned with only the section being cleared by Stuart Construction Company? A. No.

Q. What other parts were you concerned with?

A. The entire clearing in Alaska.

Q. How much—how many parts were there in Alaska? A. Three.

Q. Were they about the same size?

A. Approximately.

Q. Who had the other two?

A. Schmidt and McMahan, and Mr. John C. Miller; Schmidt and McMahan worked together.

(Testimony of William Harris Hancock.)

Q. So Schmidt and McMahan had a section, and Stuart Construction Company had a section, and Miller had a section? A. Yes.

Q. Do you know whether or not Oaks carried the payroll [524] of Schmidt-McMahan?

A. Yes.

Q. Did he carry the payroll of Miller?

A. Yes.

Q. Did McMahan draw a—have a drawing account or like a salary; was he on a salary?

A. Yes.

Q. How about Miller?

A. I believe he did, too.

Q. Well, when you charged Stuart Construction Company for the various items set forth in Defendant's Exhibit O, did you advise Stuart Construction Company of these charges?

A. Yes.

Q. How did you advise him?

A. We mailed copies of the invoices to him.

Q. When?

A. In the case of payrolls, weekly, and in case of other charges, as they came up.

Q. How did you advise them of payrolls?

A. We made out an invoice and attached a copy of the computations of the payroll for his men.

Q. May I have B, please? Now, I hand you Defendant's B and ask you whether or not that is the type of invoice you furnished. [525] Stuart Construction Company for each payroll?

A. Yes; it is.

(Testimony of William Harris Hancock.)

Q. Do you notice that long piece of paper——

A. Yes.

Q. ——attached there? A. Yes; I do.

Q. What is that?

A. That is the actual—a copy of the actual computations of the payroll and deductions as for each of the men, for which Stuart Tope was billed.

Q. It is a carbon copy?

A. That is correct.

Q. A carbon copy of the original, and one of those was mailed to Stuart Construction Company every week? A. That is right.

Q. How about these invoices, how often were they sent?

A. Just as the charges appeared they were mailed and the invoices mailed.

Q. Did Stuart Construction Company ever make—I will put my question like this; strike it, please. Did Stuart Construction Company or Stuart E. Tope ever make any complaint, [526] whatsoever, through your office with respect to any invoice or payroll statement mailed to it?

A. No.

Q. None whatsoever?

A. None whatsoever.

Q. Did your office have any correspondence with Stuart Construction Company concerning a bond?

A. Yes.

Q. Do you personally know of that correspondence? A. Yes.

Q. What was it; what was the nature of it?

(Testimony of William Harris Hancock.)

A. It was requesting him to comply with the terms of his subcontract for Stuart Construction Company and supply a bond.

Q. Do you have any idea how many such requests were made?

A. I think three in writing.

Q. Over what period of time, as you best remember? A. Two months.

Q. And what two months would that be?

A. I believe it would be January and February, 1954.

Q. Do you know—correction—did you know an individual by the name of “Butcher”?

A. Is that Owen Y. Butcher? [527]

Q. I only have J. Butcher; I believe it is Owen J. Butcher.

A. I knew an Owen Butcher, yes.

Q. Did he ever have any relationship to Mr. Oaks? A. He was a partner.

Q. In what?

A. Oaks Construction Company.

Q. Where is Mr. Butcher now?

A. Deceased.

Q. Did you ever know a Mr. J. E. Noonan?

A. Yes.

Q. Did he ever bear any relationship to Mr. Oaks? A. Yes; he was a partner.

Q. And where is he? A. Deceased.

Q. Now, Mr. Hancock, it is alleged in the counterclaim of Oaks Construction Company, Paragraph XIII, that, “The defendants have suffered

(Testimony of William Harris Hancock.)

certain damages and losses, the amount of which is currently unknown." That is at the time the counterclaim was prepared, because no final audit of the work of Oaks Construction Company was ever made. Do you know whether or not that audit was ever made, was ever completed?

A. I do not. [528]

Q. You do not yourself; well, in any event, your Honor, we wanted, and I take it Mr. Nesbett will have no objection since it is to the advantage of his client, to amend Paragraph IX to request thirty-seven thousand, four hundred ninety-eight dollars and sixty-four cents?

The Court: Instead of thirty-eight thousand?

Q. Yes.

The Court: I imagine that Mr. Nesbett would agree to that.

Mr. Nesbett: I have no objection, your Honor.

Q. And I can bring it out with another witness, but I don't see the point in it; we are forced to abandon the claim in XIII because that audit was never completed; Oaks ran out of money.

Mr. Nesbett: Which one is that?

Q. Paragraph XIII of the counterclaim damages, in an unknown amount to be determined by the audit when the entire job was finished.

May I have H, please?

Mr. Hancock, I hand you Exhibit H, Defendant's [529] Exhibit H, and ask you whether or not prior to the present time you have had an opportunity to examine that? A. I have.

(Testimony of William Harris Hancock.)

Q. In whose presence?

A. In the presence of the Bailiff of this Court.

Q. What is it?

A. It purports to be the ledger of Stuart Construction Company, Inc., general ledger.

Q. Did you go all through it? A. Yes.

Q. I direct your attention to the account therein designated, "No. 34," and ask you what information is revealed in that account?

A. No. 34 is entitled, "Oaks Construction Company, Payable."

Q. Now, what does that mean, "Oaks Construction Company, Payable"?

A. It being in the liability group of the ledger——

Q. Is it in the liability group of the ledger?

A. That is correct.

Q. Go ahead, excuse me.

A. Under September 30, 1954, there is an entry, a credit entry, setting up twenty-six thousand, nine hundred and eighty-five dollars [530] and twenty-two cents.

The Court: Will you give that again, Mr. Hancock?

A. Twenty-six thousand nine hundred and eighty-five dollars and twenty-two cents, which is a credit figure in the accounts payable ledger and would represent money owed by Stuart Construction to Oaks Construction.

Q. What date is that, please?

A. September 30, 1954.

(Testimony of William Harris Hancock.)

Q. Mr. Hancock, is that twenty-six thousand odd dollar figure familiar to you for any reason?

A. Yes.

Q. Have you ever seen it before, other than in that book?

A. Yes.

Q. Where?

A. On one of the estimates, monthly estimates, an account goes, which I prepared for Oaks Construction Company, showing the amount of indebtedness of Stuart Construction Company to Oaks Construction Company.

Q. Is that one of those that you prepared?

A. Yes. [531]

Q. Which we previously designated as a statement of account?

A. Right.

Q. Were you subpoenaed to appear here, Mr. Hancock?

A. I was.

Q. I have no further questions, your Honor.

The Court: You may cross-examine. We shall take a short recess at this time.

(Whereupon, a ten-minute recess was had at 3:00 o'clock.)

The Court: Proceed with cross-examination.

Cross-Examination

By Mr. Nesbett:

Q. Mr. Hancock, you were testifying concerning Exhibit H, before recess, will you look through that general ledger of Stuart Construction Company, were you not?

A. Yes, sir; I did.

(Testimony of William Harris Hancock.)

Q. And you were testifying from Entry No. 34, weren't you, when you mentioned the accounts payable to Oaks Construction Company?

A. Not Entry 34, Account No. 34.

Q. And that twenty-six thousand odd dollar figure, which was showed as an accounts payable, was the amount Oaks Construction [532] Company was at one time claiming Stuart Construction Company owed them?

A. That is the figure that appeared on one of the estimates which I prepared.

Q. Well, as late as August or September of 1954, after the job was over, your first estimates are a compilation of the accounting, you did have that as a figure that Stuart owed Oaks, is that right?

A. I believe so.

Q. And you made written demand on Tope for that amount?

A. That is right.

Q. Now, did you examine Exhibit H, the journal entries, or examine further in that exhibit, which is the general ledger to determine whether or not the accountant who set that bookkeeping setup, showed it simply as an amount alleged to be, or claimed to be owed by Oaks?

A. Mr. Nesbett, I can't answer your question simply; I examined the journal entries as you asked me, which is one question. What is your next question about?

The Court: Did it appear in the [533] journal or ledger?

Q. Did you determine from an examination then

(Testimony of William Harris Hancock.)

of that exhibit that the amounts claimed to be owed by Oaks were disputed by Stuart?

A. I believe you are confusing several entries.

Q. Can you answer that question or is it too obtuse? A. Would you repeat it?

Q. Can you determine from an examination of that ledger account that the amounts claimed to be owed by Oaks were actually entered by dispute by Stuart?

A. There are some entries in the ledger showing items in question; is that what you mean?

Q. Yes; the amount claimed to be owed by Oaks from Stuart was questioned, was it not?

A. That was not set up in the accounts payable as a questioned account.

Q. Did you examine Exhibit J, prepared by the same accountant that prepared the general ledger?

A. What is Exhibit J?

Q. That is the financial statement prepared by Marlor, the accountant? A. I did. [534]

Q. All of Oaks' claims of indebtedness against Stuart Construction Company were marked with question marks on that account, were they not, or statement?

Mr. Dunn: Your Honor, I think the witness should be given the exhibit.

The Court: Yes; it should be given to him, if it is marked with a question mark, why it is on the exhibit, and the witness, if the witness knows and has examined it and says he recalls it, why then you can ask him about it.

(Testimony of William Harris Hancock.)

Q. (By Mr. Nesbett): I just asked him if he does recall it, your Honor. Do you recall it?

A. I cannot recall the figures on the sheet.

Q. I hand you Exhibit J, Mr. Hancock, and call your attention to an item on the last page of the financial and operating statement, the last item under the listing of "current," an item entitled, "Oaks Construction Company, payable (?) twenty-six thousand nine hundred eighty-five dollars and twenty-two cents"; that would undoubtedly refer to the same twenty-six thousand figure you were testifying to when [535] you read the general ledger, Exhibit H, was it not?

A. That is the same figure which is indicated as questioned in the ledger.

Q. That same figure is indicated in this financial statement as questioned, is it not?

A. It is.

Q. Mr. Hancock, you are not familiar with anything that led up to the signing of that contract of December 17, 1953, are you?

A. In what way, sir?

Q. You weren't in on any of the discussions or negotiations, you simply saw the contract after it had been signed? A. That is correct.

Q. From the time you were given the contract, I assume you ran your accounting office down here in Anchorage as though that contract was still in effect, and made your charges and financial statements accordingly?

Mr. Dunn: I object to that, your Honor, at

(Testimony of William Harris Hancock.)

least it is misleading to me; he spoke of running an accounting office. This witness——

The Court: I suppose that I understand [536] the witness is an accountant?

Mr. Nesbett: He ran Mr. Oaks' accounting office.

A. That is correct.

Mr. Nesbett: Accounting department, I should say.

Q. (By Mr. Nesbett): Then you knew something of the business between Mr. Oaks and the other two contractors, McMahan and Miller, didn't you? A. I did.

Q. Did the contractor, McMahan, on another section of that clearing job, draw an advance each week or month? A. Yes.

Q. Did Mr. McMahan furnish a performance bond? A. Yes.

Q. And did Miller furnish a performance bond? A. Yes.

Q. Do you know—I'll withdraw that question. In your duties as office manager for Mr. Oaks, you didn't have occasion to go out on the jobs themselves, did you? A. Not normally.

Q. Did you say, Mr. Hancock, that in preparing [537] the number of hours each Caterpillar operated, which is shown in Exhibit P, that you did that during the month of April of 1954?

A. That is my best estimate.

Q. And do you know approximately when during the month of April?

(Testimony of William Harris Hancock.)

A. I would assume about the middle of the month.

Q. Then, Exhibit P would not reflect the operations up until May 1, or the time the project was completed, would it?

A. No; it would not.

Q. I didn't hear you.

A. No; it would not, if that date is correct.

Q. Did you have an occasion to draw up this compilation in the middle of April for any reason, other than to satisfy office routine?

A. Yes.

Q. And what was that reason?

A. In connection with correspondence to Northern Commercial Company, when they wanted to know our position regarding the account of Stuart Construction Company.

Q. And did you send that compilation, which is now Exhibit P, to Northern Commercial Company at that time, as an addendum to a letter? [538]

A. I did.

Q. You did? A. That is correct.

Q. And was the letter from Oaks Construction Company to Northern Commercial Company?

A. Yes.

Q. You wrote that letter yourself, didn't you?

A. Quite possible, in fact, I am sure I did.

Q. Do you recall suggesting to Northern Commercial Company in that letter that Northern Commercial Company and Oaks Construction Company

(Testimony of William Harris Hancock.)

join hands in fighting Stuart Construction Company's claims? A. Read that question.

Q. Read the last question, please.

(The last question was read by the Reporter.)

A. That's not a correct statement of what was in my letter.

Q. Didn't you say such a procedure had been suggested by your legal counsel?

A. That is not a correct statement of what was suggested.

Q. Didn't you say that you would welcome such an opportunity?

A. "To join forces to collect our mutual accounts," I believe are the words used. [539]

Q. Didn't you have an occasion to prepare a total number of operating hours for all those cats of Tope's after the job was all over?

A. Not that I recall.

Q. You were shown Exhibit 2, which is entitled "Cost of Operation." I believe you testified, Mr. Hancock, that that could hardly be a really true reflection of the actual cost of operation of those cats, didn't you? A. I did.

Q. Were you asked by any one connected with this case to ever prepare your estimate of the actual cost of operation of Tope's cats alone, just Tope's?

A. No.

Q. Could you do it from the records available to you? A. I seriously doubt it.

Q. Now, Mr. Hancock, are you sure that the

(Testimony of William Harris Hancock.)

compilation, now Exhibit 9, was made an addenda to a letter in April to Northern Commercial Company?

A. I am not positive of the date to which it was an addenda.

Q. Did you testify in response to a question on [540] direct examination that when you visited Mr. Bayless at Tok Junction concerning the three thousand dollar fuel bill claim that Mr. Bayless was not antagonistic? A. I did so testify.

Q. And by that, what do you mean, Bayless was not antagonistic towards Oaks or Stuart?

A. I meant that Mr. Bayless was friendly toward me and Oaks Construction Company.

Q. You discussed that three thousand dollar NSF check on that occasion with Mr. Bayless, didn't you? A. I did.

Q. Did you suggest to Mr. Bayless that he prosecute Mr. Tope on that check?

A. I did not.

Q. Did you state now that you did not suggest that to Mr. Bayless?

A. That is just what I stated.

Q. You deny that you suggested that he prosecute Mr. Tope?

A. I deny that I suggested that he prosecute Mr. Tope.

Q. Now, do you deny that you suggested that he pursue Mr. Tope by any means available, [541] in an attempt to collect that money?

A. I asked Mr. Bayless to take the ordinary and

(Testimony of William Harris Hancock.)

normal methods that would be available to him to collect his check before we paid the account for him, and I told him at that time that we would be happy, that we would pay the check if he couldn't collect it, but that we would reimburse him for any funds that he expended for legal advice in trying to collect it. That was the substance of our conversation.

Q. Is your memory now better than it was when I took your deposition and asked you questions concerning that interview with Bayless?

A. I don't believe that is a question I can answer, Mr. Nesbett.

Q. Do you recall telling me, during the course of that deposition, that you couldn't recall suggesting to Mr. Bayless that he prosecute Tope on that check?

A. I did not suggest to Mr. Bayless that he prosecute that check, and I cannot recall that I did not suggest.

Q. You can't recall, can you, what you said in your deposition?

A. I think that you can refresh my [542] memory.

Q. I'll ask you, Mr. Hancock, if you did not, in giving your deposition in this case, on the date of February 7, 1957, at my notice and insistence, and Mr. Dunn present, testify as follows, with respect to the questions as I shall read them and the answers which follow?

Mr. Dunn: Objection, your Honor, I want—I

(Testimony of William Harris Hancock.)

would like to have Mr. Nesbett tell me where he is reading from, and I would like to have the witness furnished with a copy of the deposition so that he too can follow Mr. Nesbett.

The Court: Of course, he doesn't have to do that, tell you where he is reading from. The witness should be shown the deposition, if he wants to look at it.

Mr. Nesbett: Do you recall the following questions and the following answers at that time, and at that place, and on that date?

Mr. Dunn: Your Honor, objection until he has given the witness the deposition.

Mr. Nesbett: Give me a chance. I will tell him page 31, and I am starting at [543] line 9.

Q. (By Mr. Nesbett): "Question: You don't recall whether you told Mr. Bayless to prosecute Mr. Tope for the check? Answer: No.

"Question: Your answer was what? Answer: I do not recall having told him that.

"Question: Do you recall any of the discussion with Mr. Bayless about that check? Answer: Yes.

"Question: What was the discussion in general? Answer: I simply explained to him that Mr. Tope was indebted to us on the contract and we were in the hole badly because of that and asked his co-operation in trying to collect on the bad check.

"Question: Did you offer to pay Mr. Bayless' expenses in prosecuting or attempting to collect the check? Answer: I told Mr. Bayless that we would pay the check; we would pay the three thousand

(Testimony of William Harris Hancock.)

dollars if he was not able to collect it, and if he incurred any additional expense in trying to collect on the bad check that we would take care of that.

“Question: If I told you that Mr. Bayless had signed an affidavit to the effect that [544] you, on behalf of Oaks, had offered to pay his expenses in prosecuting Mr. Tope for that check, would you say that was incorrect? Answer: I don’t know what affidavit Mr. Bayless has signed.

“Question: Well, I just merely stated to you if I told you that I have such an affidavit in my files, would you say that Mr. Bayless was incorrect nevertheless? Answer: I don’t recall telling Mr. Bayless to prosecute.”

Mr. Dunn: Your Honor, I object to his having to answer that question; he can’t possibly keep all that in mind. And I objected before it was asked on the grounds the witness should be furnished the deposition.

The Court: That was not the procedure, but the witness has testified to the same thing here. I don’t see any contradiction in his testimony.

Mr. Nesbett: Well, there is quite a bit, your Honor.

The Court: Well, very well.

Q. (By Mr. Nesbett): Do you state now that you positively did not suggest to Mr. Bayless that he prosecute on [545] that check when you visited him at Tok Junction? A. Yes.

Q. Did you not state in response to a question

(Testimony of William Harris Hancock.)

when the deposition was taken that you didn't recall telling——

A. That is what I stated.

Mr. Nesbett: That is all, your Honor.

The Court: Any redirect?

Mr. Dunn: Very little, your Honor.

Redirect Examination

By Mr. Dunn:

Q. This Exhibit P of the defendant's, was that prepared for N. C. Company or was it prepared because of negotiations with N. C. Company?

A. It was prepared to illustrate the points in my letter to N. C. Company.

Q. Was it prepared for the purpose of that letter? A. Yes.

Q. Now, I hand you this letter and ask you whether or not this is the one you used to transmit to the Northern Commercial Company the information set forth in Plaintiff's—Defendant's Exhibit P? A. Yes; it is. [546]

Q. When is that letter dated?

A. August 5, 1954.

Q. Does that aid you in setting the time that you prepared Exhibit P? A. Yes; it does.

Q. Do you wish to revise your previous statement as to when you prepared Exhibit P?

A. In the light of this date, it would have been, the approximate time that this was, this letter was written, August 5.

(Testimony of William Harris Hancock.)

Q. Well, would it, in any event, have been after the Stuart Construction Company work was through and all of the cat hours were in?

A. Yes.

Q. With respect to account No. 34 in the general ledger of Stuart Construction Company, which has been introduced into evidence, I understood you to testify to Mr.—in response to Mr. Nesbett's question, that the twenty-six thousand dollars reflected in account No. 34 was what you computed as late as September of 1954, as being due to Oaks from Stuart Construction Company; was that your testimony to Mr. Nesbett? A. Yes.

Q. Well, did that final statement of [547] account continue to change from time to time?

A. Yes; well, there was one major change.

Q. Well, in any event, is it one that is now evidenced by—is it one that is now evidenced by Defendant's Exhibit O, the final and correct one?

A. It is.

Mr. Dunn: No further questions.

The Court: That is all now of this witness?

Mr. Nesbett: No, your Honor; I have a few questions.

(Testimony of William Harris Hancock.)

Recross-Examination

By Mr. Nesbett:

Q. Now, if Exhibit P, or the compilation of cat hours was appended to a letter in August to Northern Commercial Company, why did you first testify that you thought you had compiled it in the middle of April?

A. My reason for testifying that is that my memory was not too good on the dates, primarily because there were several letters to N. C. Company in connection with the cats and their claims for payment.

Q. Didn't you select the date, the middle of April, as being the approximate date, because the last [548] date any Caterpillar is shown as having been operated on this exhibit, Exhibit P, was April 9?

A. No; I did not. I selected the date originally because N. C. first made a claim shortly—or possibly around that date, about April 16, and I knew I would be replying to them.

Q. Well, you have looked at these compilations before coming into Court here today, haven't you?

A. Yes.

Q. Do you know that the last date shown for utilization of any of Tope's cats is April 9, do you not?

A. If that is the figure there; I don't have it memorized.

(Testimony of William Harris Hancock.)

Q. Well, if you prepared this compilation for a letter that you sent in August, why didn't you use any dates subsequent to April 9, in showing utilization of a Caterpillar?

A. The only reason that I can think of for that would be that the cats were not operating.

Q. Then, would it be your testimony that since no use is shown after April 9, on any Caterpillar of Tope's, that, therefore, your records reveal to you that no Caterpillar of Tope's was used after April 9?

A. That is right. [549]

Q. And your records must have so reflected at the time you wrote the letter in August?

A. That's right.

Mr. Nesbett: That's all, your Honor.

Mr. Dunn: No questions, your Honor.

The Court: Very well; call your next witness.

(Whereupon, Mr. Hancock was excused from the stand.)

Mr. Dunn: Your Honor, Mr. Hancock is working; he is available on relatively short notice by telephone; I wonder if he can be excused to go back to his job, and possibly with an hour or so delay, if he is to be recalled——

Mr. Nesbett: I have no objection.

The Court: Very well.

Mr. Dunn: May I continue, sir?

The Court: Yes; you may.

Mr. Dunn: I would like to call Mr. McMahan.

C. J. McMAHAN

called as a witness for and on behalf of the Defendant, and, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please? [550]

A. C. J. McMahan.

Q. Where do you live, Mr. McMahan?

A. In Palmer.

Q. Were you subpoenaed to appear in this action? A. I was.

Q. Mr. McMahan, are you acquainted with the clearing of a right of way or what is commonly called the Haynes Pipeline, between Fairbanks, Alaska, and proceeding from there northerly, toward the Canadian Border? A. Yes, sir.

Q. Did you ever have any occasion to do any work on that line? A. I did.

Q. What did you do?

A. I worked on one hundred miles of pipeline clearing it.

Q. Clearing the right of way?

A. Yes; on the pipeline.

Q. What was your status on the line; for whom did you work and under what condition?

A. I had a contract from Oaks Construction Company.

Q. How much line did you have?

A. One hundred miles.

Q. Do you know Stuart E. Tope? [551]

(Testimony of C. J. McMahan.)

A. I know the man.

Q. Did you see him working on that same job?

A. He was next to me there, north of me; I know he was working there.

Q. He had the stretch north of you?

A. He did.

Q. Who had the most northerly stretch?

A. I believe a man named Miller had that.

Q. There were three of you altogether, then?

A. Three outfits.

Q. Do you know under what type of arrangement Miller worked? A. No; I don't.

Q. What is your business, generally?

A. Prospecting, gold mining, land clearing, working around equipment, with equipment—heavy equipment.

Q. Speaking in relation to time, what experience have you had in connection with clearing and the use of heavy equipment, over how many years?

A. Well, I started running tractors in Alaska around 1923.

Q. Have you been at it since?

A. I have been more or less at that work since that time.

Q. Well, by tractors, do you include [552] bulldozers? A. Yes.

Q. Is that what is commonly called a "cat"?

A. Yes.

Q. Have you had any experience in operating heavy equipment of that nature in sub-zero temperatures? A. Quite a bit of it.

(Testimony of C. J. McMahan.)

Q. Well, does it take any particular know-how to operate in sub-zero temperatures as compared with just an ordinary operation?

A. I believe it would take an experienced man; I think experience would have a lot to do with it, with the kind of work you turned out.

Q. How did the type of work that you did compare with that of Stuart Construction Company or Tope?

A. Practically the same, I believe.

Q. Same kind of work?

A. The idea was the same.

Q. Are you familiar with that country from the Canadian Border to Fairbanks, over which this pipeline runs, generally?

A. Quite familiar, I would say, I was.

Q. Are you sufficient—have you been up and down over that area a number of times?

A. I have.

Q. Are you sufficiently familiar with that country to [553] form an opinion as to the relative difficulty of clearing the three sections?

A. Yes, sir.

Q. Who would you say of the three, based on your opinion—and giving your opinion based on your experience, rather, who would you say of the three, yourself, Stuart Construction Company, or Miller had the easiest stretch?

A. Well, I always felt that Tope had the easiest.

Q. What made you think his was the easiest?

(Testimony of C. J. McMahan.)

A. There is a great deal of flat land in that area that he had.

Q. Well, how about rocks, you wouldn't call rocks easy, would you?

A. Well, there were some difficult spots on that route probably, but there was more flat land in that area than the area that I had or in the area Miller had either.

Q. Well, did you finish your job, Mr. McMahan?

A. I did.

Q. Finish it on time? A. I did.

Q. Make any money?

A. Made some money on it.

Q. Did—during the time you were working on that job, [554] did you know a fellow by the name of Roy Crawford? A. I did.

Q. Did you know a fellow by the name of Vince Abbott? A. I knew him, yes.

Q. How about a chap by the name of Hager?

A. I knew him.

Q. Did you know Mr. Oaks?

A. I knew Mr. Oaks well.

Q. Did you know this fellow, Butcher?

A. I knew him very well, too.

Q. How did those people treat you?

A. Very fine.

Q. Did they tell you how to run your job?

A. They said nothing to me at all about running the job.

Q. Did they hire your men?

(Testimony of C. J. McMahan.)

A. I hired my own men; they had nothing to do with it.

Q. Did they try to fire your men?

A. They never had any word at all about it.

Q. Well, did they—they didn't try to hire your men or anything in connection with your job?

A. They never interfered with me at all.

Q. Did they offer to do anything?

A. No; I didn't think they did.

Q. Just stayed out of your way? [555]

A. Just stayed out of my way, entirely.

Q. Did—how long did you have to finish your job?

A. About—it was over one hundred days, maybe one hundred and twenty days.

Q. That was in your subcontract?

A. That is right, I had one hundred and twenty days to do that one hundred miles in.

Q. Did you ever talk to Roy Crawford?

A. I did.

Q. Did you ever talk to him specifically about getting any more cats on your spread?

A. Well, he talked to me about it; he brought the thing up and wanted to——

Q. What did he bring up and what did he say?

A. Well, he said that Williams Brothers were getting a little anxious to get the work done and wanted to know if it would be all right with me if they could put some cats on the north end of my job there, near the Tanana River, and I told them that Roy told me—he said, “Now, we can't

(Testimony of C. J. McMahan.)

put them in there unless you say the go-ahead.” And I told them if they wanted to go ahead and put those cats in there, without any expense to me at all, why to go at it, that we would just get through that much earlier on the job. [556]

Q. I don't suppose they put them in then after you said—— A. They put them in.

Q. They did put them in at no expense to you?

A. No expense to me at all.

Q. May I have Exhibit 3, please?

Mr. McMahan, I hand you an instrument that has been designated Plaintiff's Exhibit 3, and I direct your attention to the last three pages of it. And I will tell you that it has been offered for the purpose of proving the number of hours that the cats of Stuart Construction Company, or Stuart Tope, worked on his spread up there. And I ask you to look at it for a minute or two until you feel you are familiar with it, until you understand it, and tell me when you feel you can answer some questions on it.

(Witness perused the exhibit.)

A. O.K., I will answer your questions.

Q. Do you see what it is, all right?

A. I do.

Q. Now, that exhibit covers what period of time?

A. It covers the month of—it covers the work of three cats.

Q. Well, what I mean, what dates does that ex-

(Testimony of C. J. McMahan.)

hibit [557] cover? What months are mentioned there?

A. January, February, March, and April.

Q. Now, you stated, did you not, that you had approximately twenty years of experience with cats?

A. Yes, sir.

Q. And you are also familiar with the area between Big Delta and Tok?

A. Yes.

Q. Do you know what the weather is like up there in the wintertime?

A. Yes.

Q. Well, now, Mr. McMahan, based on your experience and your knowledge of the type of work to be done, namely, clearing the right of way through virgin country, and the time of year, namely, January and February and March, through there, and the location up in the interior, between Tok and Big Delta, and given the added information that the equipment used to clear, was used equipment, I don't say it wasn't in good shape at all; I don't say yea or nay on that, but merely that it was used, can you form any opinion as to accuracy of this equipment?

Mr. Nesbett: I'll object to that question, your Honor, first of all, it is too [558] broad; the witness couldn't possibly answer it with any intelligence, covering one hundred miles, a one hundred-mile area, and the recap covering a period of months and on three Caterpillars. If there is any answer ready to be given, it must be a rehearsed answer; and, as I say, I don't think the witness is competent to answer.

(Testimony of C. J. McMahan.)

The Court: Well, if he has an opinion about—he used cats, had cats on his job, it is the same; I understand this is a compilation of the time employed in which these Caterpillars were employed, that is, Exhibit 3.

Mr. Nesbett: That is recap.

The Court: Call for his opinion as to whether or not it is accurate or not.

Q. (By Mr. Dunn): Do you have any opinion as to the accuracy of that exhibit?

A. I have an opinion.

Q. What is that opinion?

A. I don't think a man could keep his cat working those number of hours there in January and February.

Q. Why not? A. Well——

Q. Rather, here, let me restate that. On what do you [559] base your opinion?

A. Time of the year, for one thing, cold weather.

Q. What does this——

A. Equipment, the age of the equipment, it is not brand new; it had been used. It might be in good repair, but you can always have trouble with that equipment, even with the new equipment, you could.

Q. Does not this exhibit show that all three of these cats worked not less than fifty-four hours a week from January through the middle of February? A. That is what it shows.

Q. Is that possible, Mr. McMahan?

A. It might be possible, it might be possible, but

(Testimony of C. J. McMahan.)

it is not likely. I don't think that man could go up there and work that number of steady hours with that equipment, without having some trouble.

Q. Do you think there would be a break-down some place along the line?

A. They are going to have trouble getting that equipment started in the morning. How are you going to get nine hours a day in like that?

Q. Well, now, speaking of nine hours a day, let's take the month of January, in the vicinity of [560] Tok Junction, how much daylight have you got up there in January?

A. Well, it is a little longer than December, but you still have pretty short days there in January.

Q. Have you got nine hours of daylight?

A. I would say not.

Q. Did you clear any of that right of way at night up there? A. No; we didn't.

Q. Do you—does not this exhibit reflect six 9-hour days every week? A. It does.

Q. Without a break-down of the cats?

A. Without a break-down, no delay there at all.

Q. How was your payroll handled, Mr. McMahan?

A. Oaks Construction Company advanced our pay—didn't advance our pay, but as we went along we were paid weekly by the Oaks Construction Company.

Q. Were your men paid directly by Oaks Construction Company? A. They were.

Q. Did you get any money weekly?

(Testimony of C. J. McMahan.)

A. I got a salary; I got my wages, too.

Q. Was any adjustment made for your wages when you [561] got the job?

A. Well, any money I had coming from Oaks Construction Company, they paid me. Is that what you are asking me?

Q. When they made final settlement with you, how did they take your wages into consideration?

A. Deducted that from my contract.

Q. So your wages actually amounted to a drawing account?

A. This was drawn off of my contract.

Q. Now, about the time that you were getting ready to start this job, did you have—did you overhear Stuart Tope talking on the telephone in the ACS office at Tok Junction in connection with getting part of this right of way to clear?

A. Yes; I did.

Q. What did you hear?

A. Well, I don't know just what I did really hear, but I know that he was quite interested in getting on that pipeline job from the way he talked.

Q. Wanted it bad?

A. Beg your pardon?

Q. He wanted it bad?

A. That is the way it sounded to Schmidt and—Fred Schmidt and I; Schmidt was there and he heard the [562] thing and we made a little remark about it, and thought we better get in on the job if we were going to get in on it, something to that effect.

(Testimony of C. J. McMahan.)

Q. Did you see Mr. Tope from time to time as this job progressed?

A. As we started in there, I saw Mr. Tope.

Q. Did you observe his operations enough, or spend enough time with him to form any opinion as to his experience, or his ability to manage a right of way job in the middle of winter?

Mr. Nesbett: I think there should be some sort of foundation laid for that, your Honor, at least, how much time he spent around Tope's operation.

The Court: Of course, that is right, he said he saw him from time to time and all that can be elicited on cross-examination; although, we ought to eliminate as much as we can.

Mr. Dunn: I don't think that is important, your Honor, and I am not going to worry about that.

Q. (By Mr. Dunn): Did you notice what Mr. Tope did with his cat at night?

A. Fred Schmidt and I drove down there one night [563] in our pickup and the two cats were running, with nobody around at night in the dark, so I assume he was doing that to keep the machines warm, so they would start in the morning.

Q. Do you consider that good practice?

A. No; I don't.

Q. How did you handle yours?

A. Well, as soon as we quit at night, we covered it up with a big tarp and put about seven pole yard lanterns and tried to hold what heat was in there, and also maintain some heat during the night; that

(Testimony of C. J. McMahan.)

way we were able to start right away in the morning and get going.

Q. Did your cats start in the morning?

A. Started very good.

Q. Did you ever have an occasion to observe Tope's care of equipment; how he took care of equipment?

Mr. Nesbett: Now, again, your Honor, I will ask that some foundation be laid for asking a broad statement of that question?

The Court: As to what opportunity he had to observe his work with equipment?

Mr. Dunn: What opportunity, Mr. McMahan, have you had to observe the care that Tope gave his equipment? [564]

A. Well, Tope and I took a trip to Fairbanks once in his pickup, and I went to Fairbanks with him and we had some trouble coming back out there and I asked Tope to stop and told him that we maybe better look at that, but Tope didn't think it was serious, apparently, and let it go, and we kept going until finally the machine quit on us, and then we did get going again; then we—I remember that night it was pretty cold and we went from that point to Tok, it was this side of Big Delta, without any heater in the car and it was cold weather and we kind of kidded ourselves along about that a little bit, where maybe if we would have stopped and corrected the thing, we might not have—we would not—we might have had a heater to help us.

(Testimony of C. J. McMahan.)

Q. Was it just the heater in the car? Was that all that was wrong with it?

A. Well, we got it going anyway, but that was the thing that really——

Q. What stopped it, caused it to stop?

A. Well, I don't know what the trouble was?

Q. And——

Mr. Nesbett: I will object to any more of this without specific instances. [565]

Mr. Dunn: I think the objection is well taken, I thought the witness had more information than he has. I have no further questions, your Honor.

Cross-Examination

By Mr. Nesbett:

Q. Mr. McMahan, you were pretty busy up on your own clearing job, weren't you?

A. I was.

Q. You didn't have much opportunity to observe how Tope was doing his duty?

A. Just when we were together; when we started, we both started at the same point.

Q. Did you go over all of Tope's clearing area, the area that he was attempting to clear?

A. That is at the time, which might have been not more than two miles there.

Q. Just the two miles where you both started?

A. Yes; we were right there together and just drove around there one night and saw those two cats sitting there without any attention or anybody taking care of them at all.

(Testimony of C. J. McMahan.)

Q. You didn't go out and examine the area around Cathedral Bluffs or anything?

A. No.

Q. Are you familiar with the problems they ran into [566] there?

A. No; I don't know anything about that.

Q. Mr. McMahan, apparently from your answers to questions on direct examination, you were given a completely free hand with the method and manner in which you set about clearing your section of the right of way, is that correct?

A. Entirely; they didn't interfere with me in any way or suggest anything, they just came along and rode the thing over as I progressed and seemed very satisfied.

Q. Would you say that you had a performance bond for your section? Did you say that?

A. Yes; I did.

Q. What rate per lineal foot were you being paid?

A. Just under seven and three-quarters cents a foot.

Q. How much?

A. Just under seven and three-quarters cents a foot.

Q. Now, had you had an opportunity to study this Exhibit 3, Mr. McMahan, before you were handed it by Mr. Dunn?

A. No, sir.

Q. Was that your first glance at it?

A. Yes, sir.

(Testimony of C. J. McMahan.)

Q. Was your first glance your only glance at it, then? [567]

A. I looked at it right here.

Q. You think fifty-four hours per week is too much on those cats for that weather, is that correct?

A. In the winter months, I believe when it got longer there, they might have got out and put in those hours, when the daylight got longer.

Q. Did you run yours that length of time up on your job, or did you have occasion to keep track of your hours?

A. I don't think I run mine over eight hours a day, if we even got eight hours up there, but the man got paid eight hours, but to charge for a cat operating anything over eight hours a day, would not hardly be a fair thing, I don't think, at that time of the year.

Q. But at least you wouldn't operate one over eight hours a day, or you didn't do it on your job?

A. No, sir; I did not.

Q. You don't know exactly what happened on Tope's job, do you? A. No, sir.

Q. That is all.

The Court: Is that all of this witness?

Mr. Dunn: No; I have another question or two, your Honor. [568]

(Testimony of C. J. McMahan.)

Redirect Examination

By Mr. Dunn:

Q. Even though you don't know what Tope actually did, Mr. McMahan, if he ran his cats nine hours a day in January, he necessarily must have been running them at night, wasn't he? I am speaking of the length of day up there at that time.

A. Yes.

Q. And——

A. Well, that might be the way he got them to run in the morning, too, because if they run all night out there, unless he had trouble with them during the night, they would be ready to run in the morning, all right.

Q. Now, did I understand you to say that you paid your men eight hours even if they didn't operate the cat eight hours?

A. Well, they took a little time for them to get in and out there and get the machines started; they had to get the lanterns off there and the tarps off of them, and when we done that, a crank or two in the starting motor and away they would go, and we certainly were operating that cat awfully close to eight hours a day.

Q. But is it true that the hours worked by men did not reflect the hours worked by the cat? [569]

A. Not exactly, no.

Q. If a cat breaks down, does a man get paid anyway?

(Testimony of C. J. McMahan.)

A. If we tried to get the cat repaired, why, then he got paid, but the cat didn't make any money though; we weren't getting any—the cat wasn't making any money for us.

Q. You bid seven and three-quarters cents a foot? A. Yes.

Q. Could you have bid—do you think you could have bid any lower; do you recall?

A. No; I don't.

Mr. Dunn: No further questions, your Honor.

Recross-Examination

By Mr. Nesbett:

Q. Do I understand you, Mr. McMahan, to say that it is a general practice that if the cat is broken down and the operators are not actually working to repair it themselves, that they are not paid?

A. If there is not anything else for him to do, I would think that would be the general practice.

Q. Well, is it general practice?

A. It is; if they work, they get paid; if they don't work, why, they don't get paid.

Mr. Nesbett: That is all. [570]

Mr. Dunn: No questions, your Honor.

(Whereupon, the witness was excused from the stand.)

The Court: We will have a short recess; Court stands in recess for five minutes.

(At 4:00 o'clock p.m. a five-minute recess was taken.)

After Recess

Mr. Dunn: I would like at this time to read the deposition of Roy S. Crawford, who has been talked about here.

The Court: Very well.

Mr. Dunn: Mr. Nesbett, this is a rather long one, would you be good enough to help me with it; you have a copy of it, don't you?

The Court: It would make it more understandable if whoever reads the answers would take the witness stand, sit on the witness stand and let counsel read the questions and you read the answers. It makes no difference to me if you prefer to do it some other way.

Mr. Dunn: It makes no difference to me.

The Court: It is easier for the Reporter, of course; however, the Reporter will not have to report the deposition. [571]

Mr. Dunn: Your Honor, Mr. McMahan would like to know whether or not he can now be excused?

Mr. Nesbett: As far as I am concerned, yes.

Mr. Dunn: He may as far as I am concerned, your Honor.

The Court: You may, Mr. McMahan, and thank you, very much; you may be excused.

Mr. Dunn: Would you prefer to have me sworn to take the witness stand, your Honor?

The Court: No; you gentlemen do it in your own way. If there were a jury here, it would be proper, I think, for one to take the witness stand, because the jury can then understand it.

Mr. Dunn: Well, I shall read the questions and you read the answers, Mr. Nesbett.

Mr. Nesbett: That's all right with me.

Mr. Dunn: Now, your Honor, the deposition of Roy S. Crawford was taken at the instance of the defendants, Seattle, Washington, January 10, 1958, at the hour of 3:00 o'clock, Buell A. Nesbett, appearing for the plaintiffs, [572] and Butcher & Dunn, also Mr. Kahin, and Messrs. Carmony & Horswill, by Pickney M. Rohback, appearing for the defendants.

DEPOSITION OF ROY S. CRAWFORD

"whereupon, the following proceedings were had, to wit:

"Roy S. Crawford, being first duly sworn, testified on oath as follows:

"Direct Examination

"By Mr. Rohback:

"Q. Would you state your name, sir?

A. Roy S. Crawford.

Q. And your residence address?

A. 9009-20th N.E.

Q. Seattle, Washington?

A. Seattle, Washington.

Q. By whom are you employed here?

A. Boeing Airplane Company.

Q. Now, sir, is there a likelihood as to whether or not you will be in the Territory of Alaska during the year 1958?

A. I doubt it very much.

(Deposition of Roy S. Crawford.)

Q. In January, 1954, by whom were you employed? A. Oaks Construction Company.

Q. And that company was a partnership at the time?

A. I believe it was. I never saw the papers.

Q. And they were operating in Alaska, were they? [573]

“A. In Anchorage—out of Anchorage.

Q. Just for identification, can you give us the particular contract that they were working on at that time, out of Anchorage?

A. The one I was on was the pipeline between Fairbanks and Haines, Alaska.

Q. And do you know the name or identification of the general contractor or the prime contractor?

A. That was Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd.

Q. Now, then, in reference to the work of your employer, Oaks Construction Company, did you have anything to do with the work in Alaska prior to January, 1954?

A. Yes; I helped them on looking over the line and writing parts of the subcontracts, and a few contracts with the Army Engineers. That was all in December, 1953.

Q. Were you in Alaska continuously from December, 1953, through the spring of the year 1954?

A. Well, I was on the pipeline, but the pipeline was in Canada and Alaska.

Q. What I meant was, from December, 1953, did

(Deposition of Roy S. Crawford.)

you at any time return to the States before the 6th of January, 1954?

A. Yes; in December, for Christmas of December, 1953; I went out just before Christmas. [574]

“Q. You come back to Seattle?

A. Yes; and came back about the second or the third of January.

Q. So you were in Seattle, Washington, then, for a period of approximately a week or a week and a half? A. Something like that.

Q. Now, in reference to the pipeline work of your employer, Oaks Construction Company, in Alaska, did they use any subcontractors on the job?

A. On the clearing they had subcontractors.

Q. Who were they?

A. For the first 100 miles out of Fairbanks to Big Delta, it was Miller Construction Company, and from Big Delta to Tok Junction, it was—I believe he called it Stuart Construction, and from Tok Junction to the border it was two partners, McMahan and Schmidt.

Q. What was your connection with Oaks Construction, or the title of your job while you were up there?

A. I was General Superintendent on the clearing, first of all, in Alaska, and when we were in Canada, I was down there also in combination with other work.

Q. Now, I believe you advised us that you had done some preliminary work on the special condi-

(Deposition of Roy S. Crawford.)

tions or specifications of the subcontract; is that right?

A. Yes. All I set up, though, was the special conditions in general. I had nothing to do with the details [575] included in each contract. As far as I can remember, that had all been done while I was outside.

“Q. You didn’t negotiate the contracts?

A. No.

Q. When you were preparing these special conditions, did you know who were going to be the subcontractors?

A. No; I had no idea at that time.

Q. Can you tell us whether or not these special conditions which you prepared for these subcontracts were used in the subcontracts?

A. Yes.

Q. And was there a different set of special conditions for each subcontract, or did they use the same sets?

A. No; it was the general subcontract form that was made up, and they all used it, and any variations would have been a separate entry, such as unit price. Any difference was set up.”

Mr. Dunn: And then there is a notation: “Photostatic copy of document marked Exhibit A for identification and attached hereto.” I don’t know what that is, your Honor; may I see the deposition?

The Court: I suppose this is it in the original.

Mr. Dunn: Are you following it, sir?

(Deposition of Roy S. Crawford.)

The Court: No; I am listening. You [576] may have that if you want it. I suppose it was a form of contract?

Mr. Nesbett: It was.

Mr. Dunn: I was going to ask Buell if he was there, what is it? You said, your Honor, that I might use it?

The Court: Yes; you may.

Mr. Nesbett: It will come out as you read the deposition.

(Mr. Dunn continued reading the questions and Mr. Nesbett continued reading the answers.)

“Q. Mr. Crawford, I have marked as Exhibit A, or had marked by the court reporter, a photo-static copy of a document which purports to be an agreement between Oaks Construction Company, as general contractor, and Stuart Construction Company, bearing date of December 17, 1953. I want to show you this document and ask you if any portion of it contains the special conditions which you referred to as having prepared for the three sub-contracts in Alaska?

A. You mean what part?

Q. Yes.

A. It would be Article XXI, subparagraphs 1, 2, 3, 4, 5 and, actually, just the outline in 6. I didn't enter any of the station data. [577]

“Q. What does subsection 6 of Article XXI refer to?

(Deposition of Roy S. Crawford.)

A. That is the location of the work.

Q. Now, this Exhibit A is a copy of a subcontract with Stuart Construction Company, is it not?

A. Yes.

Q. Would you show that to Mr. Nesbett, to see if he agrees, so that there will be no question about it?

A. (Witness hands Exhibit A for identification to Mr. Nesbett.)

Mr. Nesbett: It appears to be.

Mr. Rohrback: As I understand, Mr. Nesbett, there is an actual copy of this contract with Stuart Construction Company attached to the complaint, in the action, is there not?

Mr. Nesbett: I believe there is.

Mr. Rohrback: What I am thinking of, there would be a way to in some way check this copy with something else, to determine if it is correct?

Mr. Nesbett: That is correct. The reason I say "it appears to be," it is either the original copy or one of the original signed copies attached to the complaint or that has been introduced in prior depositions. This is about the seventh deposition, and I say "it appears to be," because I think it is the same contract. [578]

"Q. Now, sir, in reference to the special conditions that you prepared, and for identification, please, can you tell us whether those conditions were used in any of the contracts that might have been entered into in reference to the work in Canada?

(Deposition of Roy S. Crawford.)

A. Not exactly; in general content, yes, but the contract in Canada was written by a lawyer down there. Essentially it was an agreement that was actually made right in front of the lawyer, and the conditions of this contract or the form of this contract was never even taken down there. So I would say as to the general idea, yes, but the details, no.

Q. You were not present when this particular contract with Stuart Construction Company was signed? A. No.

Q. Now, sir, can you tell us in reference to the three subcontractors which you have identified as having worked, as having done work for Oaks Construction Company in Alaska—whether the employees of those three subcontractors were carried on Oaks' payroll?

A. They were all carried on Oaks' payroll. All of the men in Alaska were carried on the Oaks Construction payroll.

Q. Now, what did you have to do with the payroll which would give you knowledge of that [579] fact?

“A. For the first period of the contract of roughly two months, the payroll was sent to me or my wife in Fairbanks, and we delivered it down the line to the subcontractors, and they passed it on to their men.

Q. What can you tell us in reference to the subcontractors themselves—whether they were carried on the payroll of Oaks Construction Company?

A. Tope was carried, and McMahon, and

(Deposition of Roy S. Crawford.)

Schmidt were carried, and I believe Miller, but I am not sure.

Q. And in what position or what job identification would those men be carried?

A. I can't remember; probably as superintendents or something like that. I don't know.

Q. Now, did you have anything to do with the negotiations between Oaks Construction Company and the various subcontractors to carry their men or themselves on the payroll?

A. Did I have anything to do with it?

Q. Yes. A. No.

Q. Do you know why it was?

A. By hearsay, just to help them along, to give them money to operate on, and it was also easier. There is quite a period from the time you award a subcontract until the man gets his first payment. It might be six weeks and sometimes two months, and this was to give the subcontractors [580] a little money to help them along.

“Q. Now, then, do you recall a conversation with Stuart Tope in January, 1955, at the Tok Lodge in reference to the subcontract he had with Oaks?

A. Yes, I remember him saying that he would be done in a very short period of about six weeks, which was quite a surprise to me, and that is why I think I remember it—that he could clear and compact one hundred miles of right-of-way. He was bragging about how much money he was making as a result, which would be a very good profit if he could do it in six weeks.

(Deposition of Roy S. Crawford.)

Q. This conversation then was concerned with the time it was going to take him to do the job and the profit he expected to make, is that right?

A. Yes.

Q. Now, can you identify for us the area that Stuart Tope or Stuart Construction was to do this work on?

A. Well, roughly, it is from Big Delta to the pumping station, about four miles north of Tok Junction. His job ended right exactly at the pumping station. On the other end it was really Buffalo Lodge at Big Delta. I could point it out.

Q. Can you give us an estimate of the miles of line that that covered?

A. Very close to 100 miles. [581]

“Q. Can you tell us, sir, how did that area that the Stuart Construction Company was to do its work in compare with the area that Miller had, or the area that McMahon and Schmidt had?

A. I believe it was easier, in that the terrain was not so rough.

Q. How about in distance—how did the three compare?

A. Very close; within five to ten miles or less.

Q. The contract which is Exhibit A actually refers to stations by number. Where would one obtain the information on the exact location of those stations mentioned in the contract?

A. They are in the Army Engineers' drawings—turned out by them, and are a part of the Master Contract.

(Deposition of Roy S. Crawford.)

Q. Now, sir, as the three subcontractors progressed, can you tell us whether or not you had anything to do with making out progress reports for them?

A. Yes, I made out progress reports at the end of a pay period. We made an agreement with the Army engineer on the job for payment of footage completed on each one of these sections, and then we advised each one of these subcontractors that according to the Army engineer, and by agreement with him, we were able to pay this footage because the government in effect was paying us that footage. [582]

“Q. Now, did you make out progress reports for the subcontractors for the whole job?

A. I made one out. I know I made at least one out early in the job.

Q. Now, why would you cease?

A. At that time I was supposed to stay in Alaska and handle the payments, but we moved into Canada, and I just didn't have the time to be doing all the paper work.

(Document marked Exhibit B for identification and attached hereto.)

Q. Now, sir, showing you what has been marked by the court reporter as Exhibit B, would you identify that for us?

A. Yes, this is the report I made out on the completion of each area under the subcontracts in

(Deposition of Roy S. Crawford.)

Alaska, which resulted in an agreement with the Army Engineers.

Q. Now, Exhibit B is an estimate for work completed by each of these subcontractors mentioned?

A. That is right.

Q. And included in this is the Stuart Construction Company? A. Yes.

Q. Mr. Crawford, did you prepare this document which is Exhibit B? A. Yes.

Q. I note that this is a copy, is it not?

A. Yes. [583]

“Q. And where were copies of this document, Exhibit B, sent?

A. That would be to each one of the men in Oaks Construction Company—for example, Butcher, Noonan, and Oaks.

Q. Those were the three partners?

A. At that time.

Q. Were copies sent to anyone else?

A. Oh, yes, copies, carbon copies to the Anchorage office manager, to the Oaks Construction Company engineer, and the cost engineer.

Q. Is what we have marked as Exhibit B a true and correct copy of the ones that you would have actually signed?

A. Yes, I am sure that must be.

Q. You have examined it, have you not?

A. Yes.

Mr. Rohrback: It is my understanding that the procedure now, as Mr. Nesbett tells me, will be that this document will not be offered in evidence at the

(Deposition of Roy S. Crawford.)

time of this deposition, but that we will furnish him a copy now, and that the document itself will be offered at the pretrial conference in Alaska.

Mr. Nesbett: Mr. Rohrback, if I have any questions to ask the witness about the validity of how that was prepared, I should do it now, so that you [584] can correct any deficiencies. Let me take another look.

(Document marked Exhibit C for identification, and attached hereto.)

Q. Now, showing you what has been marked for identification by the court reporter as Exhibit C, would you identify this document for us?

A. Yes, I made this out. It was taken from this previous exhibit—I guess it was Exhibit B—and typed up for Stuart Tope as a request for payment to Oaks Construction on the amount of work completed, in footage only, a percentage of the footage.

Q. Now, do you know whether he signed the original of that letter?

A. Yes, he signed it. I brought this down to him to show him what we had been able to reach an agreement on with the Army engineer as to the payment for him, and if it was acceptable to him, I asked him to sign it, and we would send it in to Anchorage to help expedite the payment to him, and he signed it, and I mailed it for him.

Q. Now, sir, this document—I believe I am correct—refers only to the number of lineal feet which had been completed?

A. That is right. [585]

(Deposition of Roy S. Crawford.)

“Q. It does not refer to the payment that is now due under the subcontract?

A. That is right; there is no dollars there; it is only work accomplished in units of measure of footage.

Q. Let me ask one more question about Exhibit C. Did you also prepare a similar request for payment for the other two subcontractors on the Alaska job? A. Oh, yes.

Q. And they would have signed theirs, too, the same way? A. Yes.

Mr. Nesbett: You say you saw Mr. Tope sign this?

The Witness: Yes, when he gave it back to me.

Mr. Nesbett: Where was he when he signed it?

The Witness: It was at Tok Lodge, I believe. I am not exactly sure, but I am almost certain it was at Tok Lodge.

Mr. Nesbett: It was prepared by you and taken to him?

The Witness: That is right. He didn't have to sign it, if that is what you mean, but it was just to show him what we were able to agree on with the Army Engineers, and what we would be able to pay him.

Mr. Nesbett: Did you have this in your possession prior to this deposition today? [586]

“The Witness: You mean in the last three or four years?

Mr. Nesbett: This Exhibit C?

The Witness: No.

(Deposition of Roy S. Crawford.)

Mr. Nesbett: Had you seen it before you came here today?

The Witness: I saw it a couple of days ago, when he asked me about it.

Mr. Nesbett: Do you know where it was in the meantime?

The Witness: Probably in Anchorage, as a guess.

Mr. Nesbett: I have no other questions.

Q. Now, sir, for further explanation of Exhibit C, it is dated on 6th of February, 1954, and it states it covers the work period ending 29 January, 1954. Was this in reference only to work up to January 29, 1954? A. That is right.

Q. Can you tell us, sir, whether or not this payment request, Exhibit C, covers all of the work up to January 29th, 1954, or whether it was just an advance, or what it is?

A. As I stated before, this January 29 would be the date that we met with the Army engineer and the agreement that we reached with him on that date, on work completed [587] in this area.

“Q. Now, sir, what is your recollection as to whether you continued to prepare these payment requests similar to Exhibit C for the later periods, prior to the ending of each of the three subcontracts?

A. I think I made one more out like that, and then I moved down into Canada, and I didn't have the time to do it.

Q. And then if you made another one, would it be similar in form to this one?

(Deposition of Roy S. Crawford.)

A. Essentially.

Q. Now, sir, can you tell us, in reference to the subcontractors Miller and McMahan and Schmidt, whether you made such a final estimate and payment request for them after they completed their work?

A. Yes, when they completed their work, I sat down with each one of them separately, and reached an agreement on the total footage which was taken from these drawings by the Army engineer—the drawings we mentioned before.

Q. Were you able to sit down with Stuart Tope and make such an agreement with him for Stuart Construction Company?

A. Well, he wasn't there in that area. His so-called area was finished, and we never met. [588]

“Q. Now, sir, turning to Exhibit A again, which is the subcontract, I note that under Article XVI thereof that there is the provision that the subcontractor is required to furnish payment and performance bonds. Can you tell us whether you have any knowledge, in reference to the Stuart Construction Company attempting to get bonds to comply with that contract provision?

A. Well, Oaks asked me to contact Tope several times and ask him about the bonds, and Tope told me he was trying to get the bonds, and later on I wrote him a note—I should say a letter—asking him to get the bonds. Other than that, it was all verbal.

Q. So you and Tope did have conversations with reference to getting bonds, is that correct?

A. Yes.

(Deposition of Roy S. Crawford.)

(Document marked Exhibit D for identification, and attached hereto.)

Q. Now, sir, handing you what has been marked for identification by the court reporter as Exhibit D, would you identify that, please?

A. Yes, this is a letter I wrote to Tope requesting him to get a bond.

Q. And what is the date of that letter?

A. March 22, 1954.

Q. Now, that is only a copy of the letter, is it not? [589]

A. Yes.

Q. Now, you wrote the letter itself, didn't you?

A. Yes.

Q. And you signed the original?

A. That is right.

Q. Now, what happened to the original?

A. I delivered it personally to Tope at Dot Lake Lodge. It is addressed to Dot Lake Lodge.

Q. When in reference to the date of this letter would you have delivered it to him?

A. I would say within two days.

Q. Of the date it bears? A. Yes.

Q. You do not have the original?

A. No, I gave it to him.

Mr. Nesbett: Did you write or cause this letter to be written yourself?

The Witness: I wrote the letter myself.

Mr. Nesbett: No other questions on the exhibit.

Q. Now, sir, one other question in reference to

(Deposition of Roy S. Crawford.)

getting these bonds. Do you recall any conversation that you had with Stuart Tope when he indicated that there was a possibility of his getting a particular bond for this job? [590]

“A. Yes, he told me he had an opportunity to get a bond.

Mr. Nesbett: I will register an objection on the ground that no proper foundation has been laid as to time and place and persons present.

Mr. Rohrback: Yes, that is a good suggestion.

Q. Can you tell us the particular time and place, first, as to where it occurred?

A. No, nothing other than it was one of these times I asked him about his bonds. You mean the location, such as Tok Junction?

Q. Yes. A. No.

Q. Now, in reference to time, can you tell us first whether it was before or after the date of March the 22nd, 1954, which is the date, apparently, of Exhibit D?

A. I am certain it was before that.

Q. Now, can you advise us, sir, any more definitely in reference to time—the week or month, or any such time as that?

A. January, February or March. I don't remember now.

Q. Now, can you tell us whether anyone else was present at this particular conversation?

A. I rather doubt it, because it was personal business, and I wouldn't want to talk to him about it in front of other people. [591]

(Deposition of Roy S. Crawford.)

“Q. As I understand it, you are certain it was during one of these conversations you had with Mr. Tope in reference to a bond? A. Yes.

Q. Can you tell us approximately how many of those conversations you had with him between the time of the starting of the job early in January, 1954, until the date of this letter, which is Exhibit D? A. At least three or four.

Q. Now, would you tell us what the conversation was? A. Tope told me——

Mr. Nesbett: (Interposing): I will object again for the record on the ground that no proper foundation has been laid.”

The Court: I understood by Exhibit B, he wrote a letter to him March 22, 1954. Now, the question was whether he had talked to him before that time. He said three or four times.

Mr. Dunn: Yes; now what is the question as to when? What was the question, frankly I am not sure?

Mr. Nesbett: Well, he wanted him to state the conversation and he can't lay the foundation for it in any place or month apparently.

The Court: Well, of course, he can't do that, it is some time before March 22, if there is a conversation [592] with the defendant, then he would have a right to tell what it was, if he can remember, why, of course, he should tell from the day.

Mr. Nesbett: Could we have Exhibit D and see for ourselves, your Honor, what it is?

The Court: March 22, 1954.

(Deposition of Roy S. Crawford.)

Mr. Nesbett: I was wondering if it was the same as Exhibit—if it was a copy of——

Mr. Dunn: It is already in evidence, so what are we——

Mr. Nesbett: Oh, yes, that is Exhibit D.

The Court: Counsel is entitled to the date of the conversation, but, of course, if the witness can't recall it, why, it does not bar him the right to tell what the conversation was.

Mr. Dunn: The question was on page 21.

The Court: The objection is overruled so he may answer. That is he may read his answer.

“A. Tope advised me he had had an opportunity to get a bond—but that the price that would have been charged for it was too high, and he just felt he couldn't afford it at that time.

Q. Did he identify the company that was to give the bond—that is, the company to which he had reference, or the man or the agent to whom he had reference? [593]

“A. I am sure he did, but I can't remember.

Q. Was there any conversation at this time with reference to whether Tope was going to continue to try to get such a bond?

A. Yes, that was the impression he gave me. From what he said, he was continually trying to get it.

Q. Are you aware, sir, of any time up until the time Mr. Tope left the job, when he wasn't trying to get a bond?

Mr. Nesbett: I object to that question, again, for

(Deposition of Roy S. Crawford.)

the purpose of the record as having no proper foundation laid, and the witness not being competent to answer.

Q. Let me restate the question. Did Mr. Tope at any time advise you that he had ceased his efforts to get a bond? A. No.

Q. Now, sir, you have identified for us the position you had with the Oaks Construction Company. What would be your relation then to these various subcontractors?

A. As Oaks' representative on the job.

Q. Now, did you personally at any time ever tell Tope whom he had to hire? A. No.

Q. Do you know of anyone else who was an employee of Oaks Construction Company who did tell Tope whom he had to hire? [594] A. No.

Q. Did you personally at any time tell Tope that he had to fire any particular employee?

A. No.

Q. Do you know of anyone who was an employee of Oaks Construction Company who told Tope he had to fire any particular employee? A. No.

Q. Do you know whether Mr. Tope did hire any of his own crew?

A. As far as I know, he arranged for the hiring of all his help. He might have called me up at Fairbanks—I can't specifically remember—and asked me to call the union for him, but as far as getting help, he hired his own help.

Q. Did you at any time initiate the getting of men for Mr. Tope?

(Deposition of Roy S. Crawford.)

A. Do you mean in the sense of calling the union?

Q. Yes, your getting men?

A. Yes, it is perfectly possible I did, at his request, call the union for a cat skinner or a mechanic.

Q. Now, do you know a local man by the name of Spot Harlan?

A. Yes, he is an operator-mechanic.

Q. Did you have any conversation with Mr. Tope in reference to Spot Harlan?

A. Tope wanted to hire Harlan, and the only question I had was who was going to pay him to work, because Harlan [595] didn't have a union clearance, and as a result of not having a union clearance, the Oaks Construction Company, under its agreement with the union, could not put him on the payroll.

Q. Could not put Harlan on Oaks' payroll?

A. It could not put Harlan on Oaks' payroll, and, of course, we would be carrying him on the payroll for Tope, and paying with Oaks Construction Company checks.

Q. Now, sir, other than running this employee or any employee through the Oaks payroll, did you express any objection to the hiring of Spot Harlan?

A. No, it was his responsibility to hire him.

Q. Can you tell us whether or not that would have been up to the discretion of Mr. Tope, whether he was hired, so long as he was not run through the payroll of Oaks Construction Company?

(Deposition of Roy S. Crawford.)

A. He could hire him if he could finance the payment of his wages.

Q. Do you recall another person who was either a mechanic or welder, and who had a shop, about whom there was a conversation between you and Mr. Tope on union clearance?

A. Yes, Tope wanted to put him to work, and the man didn't belong to the union, and I again told him that without a union clearance we could not put him on the Oaks [596] payroll.

“Q. Do you know whether or not Tope actually did or did not hire that man?

A. It seems to me the man had done some work for Tope, but as far as I know, he was never put through the Oaks financial route.

Q. Now, in reference to either Harlan or this last gentleman we have been talking about, did you advise Mr. Tope that he could not hire either of those men?

A. Well, what I am trying to say is that I advised him we could not put the man on the Oaks' payroll. As far as him hiring men, in the end result he had the choice.

Q. Do you remember a man by the name of Slim Allred? A. Vaguely.

Q. Do you know who hired him?

A. No, I don't know.

Q. Did you? A. No.

Q. Do you know of any instance where Mr. Allred attempted to boss Tope, or instruct him what to do on the job? A. No.

(Deposition of Roy S. Crawford.)

Q. Do you remember a man by the name of Warren Hager? A. Yes.

Q. What was Hager's position, and when?

A. Well, Hager was sent up at the start of the job to [597] locate where the right of way would run, to flag it, so that Tope, with his equipment, could stay within the boundary of the right of way and do the clearing work. But he was on the Oaks payroll, as an engineer, and he also was what you might call an inspector to see if Tope was following the terms of his contract.

Q. And he was an employee of Oaks Construction Company?

A. He was an employee of Oaks Construction Company.

Q. Do you know whether Mr. Tope and Mr. Hager got along very well on the job?

A. Not too well.

Q. Was there anything done by yourself in reference to clearing up that situation?

A. Yes, I moved Hager up to Miller's spread, or subcontract, and this man Abbott was coming up from the States. He had been out for the winter, and we put Abbott down in Tope's portion, to represent us.

Q. Now, then Abbott became the line locator and the inspector?

A. Yes, he did that, and also the terrain that Tope was working through, as it turned out, was very easy to locate in comparison with the other areas of the whole pipeline, and we offered Abbott

(Deposition of Roy S. Crawford.)

to Tope to work as foreman, because Tope at that time was having lots of equipment trouble, and spending a vast majority of his [598] time repairing his equipment, and he couldn't be in two places at once—fixing the equipment, and out where the equipment was working. But that was at his choice; I mean, the man was available, and he didn't have much work to do, and he had the reputation for operating equipment and being a good one, so we offered him to him.

Q. Can you recall the discussion with Mr. Tope in reference to Mr. Abbott—as to who else was present, if anyone?

A. Yes, it was between Tope and Jerry Noonan and myself in Fairbanks.

Q. And about when would this have been?

A. Some time in February of 1954.

Q. Now, then, at that conversation was there any mention of a man by the name of Duke Oaks?

A. Oh, yes, Tope admitted that he needed help, because, as I say, he couldn't be in two places at one time, and we offered Abbott, and he made the suggestion that we let him make Duke Oaks foreman. Well, it wasn't a case of us letting him, and there was an argument back and forth in which we said, "We can't give you Duke Oaks unless you are going to pay his wages, because that would be two men on the job. Abbott will be there to locate line, which he can do, and if you want him [599] take him and use him, and there will be no cost because we have to have a man there."

(Deposition of Roy S. Crawford.)

Q. In other words, as I understand it, there was to be no charge to Mr. Tope for the use of Abbott's extra time? A. That is right.

Q. But you said that if he wanted Duke Oaks he would have to pay him for it?

A. Well, the basic idea was that we didn't want to use Duke Oaks as our representative. Now, Abbott would be on the job. If Tope wanted Duke Oaks, that was his prerogative, but that would be extra cost to him, whereas he could have Abbott for nothing.

Q. Can you tell us whether or not he did accept the services of Abbott? A. Yes, he did.

Q. And did Abbott thereafter work under him?

A. That is right.

Q. Did Tope at any time thereafter tell you that he didn't want Abbott working for him?

A. Not that I remember.

Q. Now, sir, can you tell us in reference to which of these subcontractors in Alaska used their own tools and equipment on that particular job?

A. Well, they started their jobs—their own particular [600] jobs, with their own tools and equipment, but later on in the job every one of them borrowed a cat, or asked Mr. Oaks to bring a cat in, and as the job progressed, they were using additional equipment that was not their own.

Q. But up to that time, at the start of the job, each had their own equipment——

A. That is right.

Q. ——and tools?

A. Yes.

(Deposition of Roy S. Crawford.)

Q. Are there many tools used by them in this type of work? A. A fair amount.

Q. What does the equipment consist of? What type of equipment? A. Trucks and cats.

Q. Now, was any extra equipment brought in on the area where Tope was working?

A. Yes, there was some agreement about it. I don't know the details of it, but Oaks delivered a cat. He contacted Rodgers and Babler and got a cat and delivered it for Tope himself.

Q. Was there any other equipment that was brought in at this time than this one Rodgers and Babler cat?

A. Yes—you mean for Tope?

Q. Yes; if you recall? [601]

“A. Yes; there was some more equipment. I don't remember what all, but I know he ended up with enough cats to have two operations running along the line at one time.

Q. Prior to this extra equipment, how many locations was he able to work? A. One.

Q. You call these locations spreads, don't you?

A. Well, a spread means, like you would use the word fleet. It represents several pieces of equipment working together.

Q. So after he got the additional equipment he was able to run two spreads, is that right?

A. That is right.

Q. Now, do you know whether or not Tope was agreeable to having this extra equipment loaned to him, and using it?

(Deposition of Roy S. Crawford.)

A. Insofar as I know, he was agreeable.

Q. He never objected to it to you, did he?

A. No, I had nothing to do with the negotiations to bring the equipment in.

Q. But, as I understand your testimony, you do know he used it?

Mr. Nesbett: I object to that as leading.

Mr. Rohrback: Let me rephrase it. I think it is merely repetitious.

Q. Can you tell us whether or not Tope actually did use the [602] extra equipment? "A. Yes.

Q. Now, can you tell us whether or not the other subcontractors objected to the extra equipment loaned to them?

A. No, each one of them got extra equipment through Oaks' help.

Q. I would like to go back for one more question with reference to Exhibit D, which was previously identified, the letter of March 22, 1954. I wanted to ask you, Mr. Crawford, if under the date of March 22, 1954, you did not address a letter to the Stuart Construction Company at Dot Lake Lodge, Alaska, and actually deliver such a letter to them, which read as follows:

'Gentlemen: Since you have not complied with Article XVII of your subcontract, and the Oaks Construction Company letter of 27 February, 1954, with regard to furnishing performance and payment bonds for your clearing contract with this company, you are hereby notified that unless you secure and give notice to this Company that you

(Deposition of Roy S. Crawford.)

have secured these bonds by 26 March, 1954, the provisions of Article XV will be enforced and the Oaks Construction Company will take over your work and complete same at your cost and expense.'

Did you write such a letter, and deliver it personally?" [603]

The Court: That is the Exhibit D or E, something like that?

Mr. Dunn: Yes. Then you say, Mr. Nesbett, "Yes, I——

"A. Yes, I personally delivered it a day or two later than the date it bears.

Q. Now, with reference to the work that Stuart Construction Company was doing under its subcontract, do you recall a rocky area, and a discussion with Mr. Tope in reference to skipping that area or going around that area temporarily?

A. Well, that was the Yerrick Creek area, and we argued over the Yerrick Creek area because Tope wanted to by-pass it. I know I argued with him considerably because it is what we call a flood plain, and with the time limit that he had to finish the job, if he by-passed it he might never be able to get back into it until later in the summer, and, as a result, slow us down and slow the pipeline down, too.

Q. Now, what would have happened in that area with a thaw, a spring thaw?

A. It is an area where the water spreads over quite a distance of the pipeline right of way. It comes in at right angles and fans out, and if you

(Deposition of Roy S. Crawford.)

had to clear it in the summer time, it would be very difficult because of the water and the fact that the contractor would have quite a bit of difficulty having traction through [604] there.

“Q. Can you identify where this area is?

A. It is approximately four miles north of the first road crossing of the pipeline after you leave the Tok pumping station.

Q. Now, sir, can you tell us what did Mr. Tope initially want to do in reference to that area?

A. To by-pass it and get it later.

Q. Can you tell us whether or not you ordered him to do one or the other—in other words, not to by-pass it, or to by-pass it?

A. I don't think I could order him to do it, but I could certainly argue with him.

Q. What was the final decision? Did he by-pass it?

A. No, he went on through.

Q. Do you know whether anyone else who was an employee of Oaks Construction ordered him not to by-pass that area?

A. Oh, no.

Q. Can you tell us whether or not the decision to stay in that area and not by-pass it was Mr. Tope's decision?

A. Yes, it would have to be.

Q. Now, sir, can you tell us whether you at any time forced Mr. Tope to work in weather he thought was too cold for his machines?

A. No.

Q. Do you recall whether there was any discussion that you [605] had with Mr. Tope in reference to cold weather operation of the machines?

(Deposition of Roy S. Crawford.)

A. Carl Oaks sent some literature that I think was put out by the Caterpillar people on cold weather operation. He sent it to me, and I took it down and gave it to Tope. My recommendation, after looking at this pamphlet, was to not operate below 40 below zero. In other words, it was a recommendation to save his equipment.

Q. You say recommendation. Was there any order that you gave in reference to that?

A. No; you can't tell a man if he wants to work.

Q. Now, do you know whether anyone else who was in Oaks' employee gave any orders to Tope that he was to work or was not to work in reference to weather?

A. No.

Q. By your answer, "No," you mean no one did, to your knowledge?

A. No one did to my knowledge.

Q. Now, Mr. Crawford, I want to ask you if you have a recollection concerning a conversation that you would have had with a Mr. Bayless and Mr. Tope concerning a fuel oil bill?

A. Yes; either Bayless or Tope called me at Fairbanks—I think it was Tope—and told me that Bayless wouldn't give him any more fuel. So I called Mr. Oaks in Anchorage, and he told me to contact Bayless and tell him not to worry about Tope's fuel bill, and that Oaks [606] would stand behind it, and see that it was paid.

Q. Did you subsequently contact Mr. Bayless?

A. Yes, I went up to Tok Junction, where Bayless has his headquarters, and I personally con-

(Deposition of Roy S. Crawford.)

tacted him alone and told him that Oaks had told me to tell him that Oaks would stand behind the fuel bill.

Q. Now, can you identify when that was, approximately? A. It was about late February.

Q. Now, did you at that time or shortly thereafter have a conversation with Bayless and Tope together?

A. Yes, that same night, I believe it was, after work had shut down, Bayless and Tope and I were all in the Lodge, and the question of this fuel oil bill came up again. I have no idea how it started, but Tope talked over his estimate with me in conjunction with Bayless.

Q. By "estimate," what do you mean now?

A. What work he had accomplished; in other words, his total and what he could expect for his completion of work for this period of time, whenever it had recently ended.

Q. Can you tell us from your own definite knowledge how much money Mr. Tope would have coming at the time of this conversation?

A. I would have a knowledge of his gross payroll before anything had been taken out. I had no idea of his net.

Q. How would you know the gross? [607]

"A. Because I knew the footage he had completed within a certain period, and I also had knowledge of his unit foot price.

Q. He was paid per foot, wasn't he?

(Deposition of Roy S. Crawford.)

A. Yes; the footage times the unit price would give the gross.

Q. Now, why do you say you would have no knowledge of the net he would get?

A. I didn't keep books for him.

Q. Now, what was this conversation to your recollection with the three of you that night at the Lodge?

A. I think it was intended to make Bayless a little happier about his bill. I had already told him Oaks would guarantee it, and I think Tope just wanted me to tell him he had money coming.

Q. Were you present when any check for \$3,000 was given to Mr. Bayless?

A. No. I heard about it later in the sense that I heard about it later from Tope. The next morning at breakfast Tope told me he had given him a check, whereas the night before he had mentioned he didn't have any money in the bank, and that certainly stuck in my mind, why a man would give a check when he had no money to cover it.

Q. Did you at any time tell Tope or Bayless that Oaks would see that he was paid? [608]

"A. No, I only told Bayless his fuel bill would be paid.

Q. Did you at any time during this period tell Tope how much money he had coming, or when he would receive it—the net he actually had coming?

A. Tope and I might have figured out his gross, but, again, I didn't know what he had in deductions.

(Deposition of Roy S. Crawford.)

Q. Now, sir, were you present when Tope left the job? A. No.

Q. Do you remember when that was?

A. The date?

Q. Yes A. Not now.

Q. How did you hear about it?

A. Vince Abbott called me and told me that Tope had left.

Q. Do you know whether any of Mr. Tope's equipment was used after he left?

A. No; at that time I told Abbott to leave Tope's equipment alone, and, if possible, to park it off the highway, and to leave it alone. As far as I know, it was never touched again by any of the crew we had.

Q. How was the work of the subcontract then finished?

A. That was by bringing in more equipment that Mr. Oaks acquired. We set up our own crew and operated it.

Q. You were subpoenaed to be present at this deposition, were you not? [609]

"A. That is right."

Mr. Dunn: That brings us to the cross-examination, your Honor.

The Court: Is it a long cross-examination?

Mr. Nesbett: Well, it goes on from page 38 to 61.

The Court: We better suspend then, we can't finish it today. Very well, let the Court stand in recess until ten o'clock tomorrow morning.

(The Court then recessed until Friday, August 15, 1958, at ten o'clock a.m.) [610]

(Deposition of Roy S. Crawford.)

The Court: Good morning, Gentlemen of the Bar. Are you ready to proceed with the case on trial?

Mr. Nesbett: Yes, your Honor.

Mr. Dunn: Yes, your Honor. I believe, your Honor, we were reading the deposition of Mr. Roy S. Crawford.

The Court: Yes, you were.

Mr. Dunn: With your permission.

The Court: The direct examination has been concluded as I remember.

Mr. Dunn: This is cross-examination, your Honor.

The Court: Yes, sir. I take it since you are reading it, the deposition taken on behalf of the plaintiff, I am sure it was offered by the plaintiff.

Mr. Nesbett: No, your Honor. Just the other way around. This deposition was taken by the——

The Court: Oh, yes, by the defendant.

Mr. Nesbett: Cross-examination by me.

The Court: I see. You finished your direct examination in reading?

Mr. Dunn: Yes, sir.

The Court: Now you are reading your cross-examination?

Mr. Nesbett: Yes.

Mr. Dunn: Page 38. (Reading the deposition.)

(Deposition of Roy S. Crawford.)

Cross-Examination

“By Mr. Nesbett:

Q. Mr. Crawford, have you read the deposition of Mr. Oaks before [612] you testified today?

A. I read his deposition some time last spring, a year ago.

Q. Haven't you read it since then?

A. No.

Q. Did you read the deposition of Tope and Harlan? A. At that time?

Q. At that time?

A. I think it was in March or April.

Mr. Rohrback: Of 1957?

The Witness: Yes, 1957.

Q. Now, Mr. Crawford, do you recall what objection the union had to the hiring of Spot Harlan?

A. What objection they would have, or did have?

Q. Did have?

A. I don't know that they had an objection.

Q. Was the union asked to pass on Mr. Harlan as an employee of Oaks?

A. Eventually they cleared him, and he brought him down on the job, I know that. That is my personal opinion.

Q. Do you recall what objection the union had to Mr. Tope's hiring him in the first place?

A. Well, at the time I talked to Tope about Harlan, Tope wanted me to put him on the Oaks

(Deposition of Roy S. Crawford.)

payroll without a clearance from the union. That was the whole argument between Tope and me. [613]

“Q. And you refused to let him go on the Oaks payroll, is that right? A. That is it.

Q. And the reason being what?

A. Oaks was a member of the Associated General Contractors, and they have a Master Agreement with the union to hire through the hiring hall at the union.

Q. And did you talk with the union as to whether or not Harlan would be okay on your payroll?

A. Tope told me he didn't have a clearance.

Q. Did Harlan go to the union in Fairbanks and in a matter of a day or two after your first refusal get a clearance from the union?

A. He eventually got a clearance. Whether it was two or three days or a month, I don't remember. I know he was on the job.

Q. He actually wasn't put on the job until the three cats from the McLaughlin Brothers were brought down on that section, was he?

A. I think that makes sense.

Q. Did you have any conversation with Harlan about his being hired to work on Tope's section of the pipeline? A. I don't remember.

Q. Could you have had some conversation with him about it and have forgotten it? [614]

“A. It is very possible. Harlan was practically a permanent resident at Tok Lodge. He lived there,

(Deposition of Roy S. Crawford.)

and everyone stayed there when we were in the area.

Q. Do you recall having a conversation with Harlan to the effect that you couldn't okay his being hired because there was a brother-in-law or son-in-law of one of the Oaks who had to be hired, and was working at the pumping station in that area?

A. There was an Indian that was hired from a pumping station.

Q. Was his name Wesland, or something similar? A. I wouldn't know.

Q. Do you recall that name?

A. No, I recall a man from the pumping station, but I don't recall his name.

Q. Do you recall he was a relative of someone closely connected with Oaks?

A. I doubt it very much, due to the nationality.

Q. Do you recall anything in that respect?

A. No.

Q. Do you recall telling Harlan that he could not be hired because this employee at the pumping station had to be hired first?

A. I do not, but it is possible that we had a clearance—I mean I had gotten a clearance or Tope had gotten a clearance for this fellow, and, naturally, he would go on first if he had a [615] clearance.

“Q. Would you say Tope got the clearance for this native at the pumping station?

A. When I said I don't remember, it is because

(Deposition of Roy S. Crawford.)

all three of those fellows, McMahon and Schmidt and Tope, and Miller, possibly—some of them did. I don't know which ones did call in and ask me to go over to the union and get a man for them.

Q. It is a fact, isn't it, that you told Harlan that he couldn't be hired because this native had to be hired first?

A. I don't remember any conversation like that. The basic idea was that we had to work through the union. If the native had a clearance from the union, naturally, he would go first. Now, I do remember it clearly——

Q. Well, excuse me. You have answered the question. Did Tope ask that this native be hired, or do you recall?

A. I believe that Tope laid him off.

Q. Can you answer that question—did Tope ask that this native at the pumping station be hired?

A. Specifically by name, no.

Q. A native, though, was hired?

A. It was later.

Q. He was later fired for drinking on the job, or something?

A. For some reason. I don't recall.

Q. Harlan was not hired the first time Tope asked that he be hired, was he? [616]

"A. No.

Q. Did you tell Tope to get Harlan a clearance, and it would be all right—a clearance from the union?

(Deposition of Roy S. Crawford.)

A. It would be all right with the Oaks' payroll, yes, I could very well have told him.

Q. Did you tell him that?

A. I am certain I told him we couldn't put Harlan on the Oaks payroll because we didn't have a clearance from the union. We couldn't put him on the Oaks payroll without the union clearance.

Q. Why didn't you tell Oaks to have Harlan go up and get a clearance from the union and go to work?

A. You mean, tell Tope that?

Q. Yes, tell Harlan to get a clearance and go to work?

A. I wouldn't say that I did or didn't tell him that.

Q. Did you tell him that?

A. I don't know.

Q. Tope made another attempt to hire Harlan shortly after the first attempt, didn't he?

A. I only remember the fact that we talked about this one time. He wanted to put Harlan on the payroll, and he did put him on the job some period later.

Q. Getting back to the question: Tope did attempt to hire Harlan a second time shortly after this first attempt, did he not?

A. I don't know how Harlan got on the job. Is that what you mean? Harlan got on the job later. [617]

“Q. Harlan did turn in some time cards to Oaks, didn't he, for work done?

A. When? The first time?

Q. Yes.

(Deposition of Roy S. Crawford.)

A. I thought he hadn't put Harlan on yet.

Q. Harlan was a good man around a cat, wasn't he?

A. Yes, a very good man.

Q. When Harlan finally came to work, he was employed at about the same time the three McLaughlin Brothers' cats came down, wasn't he?

A. That could well be.

Q. He was hired, then, at the insistence of McLaughlin, wasn't he?

A. I don't remember now. It is possible that he was, because he had been a McLaughlin employee.

Q. He had been working for them before, hadn't he?

A. Yes.

Q. As a matter of fact, McLaughlin's foreman or superintendent said he wouldn't allow the cats to go down in that area unless Harlan was looking out for them, didn't he, or something to that effect?

A. I had no part in the arrangement to move the cats down. I didn't know about that until it happened.

Q. When you first learned about Harlan, he had already started to work for Tope, hadn't he?

A. I just said I don't know the date he worked. [618]

“Q. Didn't you, as a matter of fact, find that he was working, and discharge him?

A. I couldn't discharge him.

Q. Didn't you then, as a matter of fact, find that he was working, and tell Tope that he couldn't get paid and he wouldn't get paid?

A. You mean payroll-wise?

(Deposition of Roy S. Crawford.)

Q. Yes.

A. I told him he couldn't be on the payroll. Now, whether the man was working or not, I don't remember. I was under the impression he hadn't even worked yet. Whether he had worked or not, I knew he didn't have a clearance, because that was the fundamental problem.

Q. Were you trying to prevent Tope from getting Harlan on the job to take care of the cats?

A. No.

Q. Why didn't you tell Tope, "Look, Tope, get this man cleared through the union, and he can stay on the job. Otherwise he can't."

Mr. Rohrback: We will object to the question as being repetitious and also arguing with the witness, as well as asking a hypothetical question on a state of facts.

(Question read.)

A. I could have very easily entered into such a conversation.

Q. Do you recall telling him anything similar to that? [619] A. No, I don't.

"Q. How did you get along with Tope on the job? A. Pretty good.

Q. You two did have some differences, though, didn't you? A. You mean on the job?

Q. Yes.

A. I don't think anything unusual; just the normal arguments over completion of work and phases of the work.

(Deposition of Roy S. Crawford.)

Q. Would you argue with him on occasions?

A. On interpretation of work to be done, but nothing—

Q. I am just asking you, did you argue with him on occasion about work?

A. I believe I did, yes.

Q. Was that concerning the manner in which the work was done, or clearances?

A. Yes; I am sure I did. I argued with him over conditions in his contract or what he was supposed to do. On thinking about it, I am sure quite a bit of it was based on the fact that we couldn't give payment for work as completed he felt was completed. That was the basis of the argument.

Q. He couldn't get payment for any of the work done, could he?

A. Well, he got payment, surely.

Q. Do you know that he ever got payment?

A. You mean money?

Q. Yes. [620]

“A. Oh, what he received in dollars and cents, I don't know. I had nothing to do with that.

Q. Do you know that he ever got any payment?

A. Dollars?

Q. Payments of money for work done?

A. I think of a payment as his progress. He admittedly had progress payments, but dollar payments—I don't know what he got.

Q. Did you have a fight with Tope on one occasion after he left the job?

(Deposition of Roy S. Crawford.)

A. Well (pause)——

Q. I just asked you if you had a fight with Tope on one occasion?

A. After he left the job; it was a rather one-sided fight.

Q. Was it rather one-sided? A. Yes.

Q. Did you have any fights with him before you left the job? A. No.

Q. Do you know whether Hager had any fights with him on the job?

A. You mean physical fights, or arguments?

Q. Physical fights.

A. I don't know of any.

Q. You had quite a bit of pipeline to inspect, didn't you? A. Six hundred miles.

Q. How often would you say it was that you got into Tope's area?

A. On an average of once a week, because at the time Tope was [621] there, we weren't working the whole six hundred miles.

“Q. How long would you stay on Tope's particular section, for example, when you would visit him? A. You mean how long I would stay?

Q. Yes, generally.

A. Oh, anywhere from two or three hours to a day.

Q. Did you talk with Tope very much on those occasions? A. I always visited him, yes.

Q. How long was Hager on that section, do you recall?

(Deposition of Roy S. Crawford.)

A. Well, percentage-wise, about half of the time that Tope was there.

Q. Was Hager under you directly as an employee of Oaks? A. Yes.

Q. Was Duke Oaks any relation to Mr. Carl Oaks? A. His brother.

Q. Was he a cat skinner by trade?

A. I never knew Duke Oaks before this job. He was a cat skinner on the job.

Q. Whose particular section was he working on?

A. He worked for Tope.

Q. He worked for Tope? A. Yes.

Q. And Tope wanted to put him in what position when you had this conversation in Fairbanks?

A. He wanted to put him on as foreman. [622]

Q. What?

A. He wanted to hire him as foreman.

Q. And the conversation in Fairbanks regarding that matter was between you and Noonan and Tope, is that right? A. Right.

Q. Was that approximately in the latter part of January, 1954, to the best of your recollection?

A. That would be a fair guess.

Q. Wasn't that the occasion when Noonan was up in the hotel room and you were with him, and Noonan was pretty well liquored up?

A. I don't remember.

Q. Didn't Tope come to town from his section on that occasion and he had to buy a couple of bottles of liquor for Oaks at his request?

A. Oaks?

(Deposition of Roy S. Crawford.)

Q. I mean, for Noonan?

A. For Noonan? I don't know if Noonan asked him to. The meeting was in Noonan's office or in his apartment in the building he was staying in.

Q. Noonan was in his apartment or hotel room drinking, and you were there with him when Tope came in, weren't you?

A. As far as drinking, I don't remember.

Q. Now, why were you sending Vince Abbott to the job to replace Hager?

A. Because Hager and Tope weren't getting along at all. [623]

“Q. And Tope, on the other hand, wanted to hire Duke Oaks, is that right?

A. He could hire Duke Oaks if he wanted to.

Q. He wanted to hire him, did he not, and Mr. Noonan objected?

A. I don't think he objected. He argued with him over the fact that it would cost Tope more money because we had to have a man on the job to represent us and flag line. By that I mean survey line, and Duke wasn't qualified to flag and survey line; so that meant he would have had Duke as foreman and we would have had to have a man on the job to locate line and flag it.

Q. Was it your thought that Vince Abbott could handle both jobs and save money?

A. Yes, he was experienced.

Q. And save money?

A. And save money, yes.

(Deposition of Roy S. Crawford.)

Q. Abbott, then, would act as Oaks' representative and likewise as Tope's foreman?

A. Yes, with the agreement of Tope.

Q. And the arrangement insisted on by Noonan was that Abbott be used in that capacity and that Duke Oaks not be used in that capacity, is that correct?

Mr. Rohrback: Excuse me, counsel. I don't understand what you mean by "that capacity." As I understand the testimony, Abbott was to have two capacities: one representing Oaks, and one working for Tope, if Tope desired. So I will have to object to the [624] form of the question. If you will explain by what you mean by "that capacity," because I don't understand—the words "that capacity" refer to two capacities.

Q. Noonan wouldn't agree to putting Duke Oaks on the payroll as Tope's foreman, isn't that right?

A. No, that is not right.

Q. Was Noonan agreeable to putting Duke Oaks on the Oaks payroll as Tope's foreman?

A. Was he agreeable? I am getting lost in the words here. Noonan had no objection to Duke Oaks' being foreman. Does that answer your question?

Q. Foreman for Tope?

A. Foreman for Tope.

Q. He had no objection whatsoever?

A. He might have argued with him as a matter of economy, yes. I am certain he did.

Q. Did Noonan consent that he be paid as foreman out of Oaks' payroll?

(Deposition of Roy S. Crawford.)

A. Well, the agreement between Oaks Construction Company and Tope did allow him to be his foreman. He could have anybody he wanted as foreman, and Oaks would be the fellow or not be the fellow to pay the salary checks.

Q. Didn't you testify in response to the questions on direct that Tope could have hired Duke Oaks as foreman if he wanted to, but that he would have had to pay him himself? [625]

"A. No, if I said that that was a misunderstanding.

Q. You didn't so testify?

A. I certainly didn't mean to say it, if I said it.

Q. Then Noonan's position was something like this, was it not: "If you want Duke Oaks as foreman, you can have him, but I recommend against it. I would rather have Vince Abbott do the job." Is that right?

A. As a matter of economy, yes, and as a recommendation.

Q. And Vince Abbott was to be the locator, the line locator for Oaks? A. Yes.

Q. And likewise handle the job as Tope's foreman, is that right?

A. He was offered to be used as Tope's foreman.

Q. Tope, however, wanted Duke Oaks as foreman, isn't that right?

A. Yes, in the initial stages he said he wanted Duke Oaks.

Q. The result of the conference was that Vince Abbott went down on the job, isn't that right?

(Deposition of Roy S. Crawford.)

A. Vince Abbott would have gone down on the job in any event.

Q. Just answer the question. The result of the conference was that Vince Abbott went on the job?

A. Vince Abbott was definitely going on the job before this meeting occurred as Oaks' representative.

Q. And he did go on the job as Oaks' representative, didn't he? A. Right.

Q. Did he also go on the job as Tope's foreman? [626]

"A. Yes. May I make a point clear? As Tope's foreman, he was working under Tope in that phase of the work. He wasn't a foreman over Tope.

Q. Did Tope himself, to your knowledge, ever hire anyone to work for him on that section?

A. When I arrived back in Alaska, he had his crew. I don't know what arrangement he had made. He had his basic crew.

Q. Do you recall anyone who composed that basic crew?

A. I know quite a few men who were on the job, but I can't think of their names. They were construction people.

Q. And is it your recollection that Tope hired them all himself?

A. I have no recollection of Tope hiring men; he got these men. I know that.

Q. Did he hire Duke Oaks to begin with, or do you know?

(Deposition of Roy S. Crawford.)

A. I don't remember when Oaks came on the job even. I think he came a little later.

Q. Did Tope ever fire anyone, to your knowledge?

A. I believe he fired the—well, I am not sure. I believe he fired the native from the pumping station.

Q. Do you recall approximately what month this argument between you and Tope occurred concerning his moving his operation to the other end of his section and working back?

A. It must have been at the tail end of January or possibly early February, because of the distance he had covered up to that time. [627]

“Q. He was in a pretty rocky area at that time, wasn't he? A. Rough terrain, yes.

Q. The temperatures were going well below forty degrees minus zero on many nights, weren't they?

A. Yes, it was an extremely cold winter.

Q. And on some occasions I believe it went as low as 65 below, didn't it, that year?

A. I don't remember 65, but I do remember 60.

Q. From your experience, there is quite a high breakage occurrence on metal operated in those temperatures, isn't there?

A. You have a problem, yes.

Q. Isn't it a fact that Tope wanted to move to Big Delta and work back on his section because of that rocky area and the high breakage that was occurring on his cats?

(Deposition of Roy S. Crawford.)

A. The only thing I remember now is that he wanted to move around or by-pass this Yerrick Creek area. Now, he may have come up with the proposition to go to Big Delta; I don't remember."

The Court: That is the area where the rocks were?

Mr. Nesbett: Yes, sir.

Mr. Dunn: I believe it is true, isn't it, that this rocky area generally is between Cathedral Bluffs and Yerrick Creek?

Mr. Nesbett: I concede it was right in the Cathedral Bluffs area. That is all I know about it for sure.

Mr. Dunn (Reading): "Q. He wanted to work from Delta back, didn't he, and then get the rocky area? [628]

"A. He could have.

Q. Wasn't that the matter that caused the argument between you?

A. The argument was over skipping Yerrick Creek—the Yerrick Creek area.

Q. Why did he want to skip the Yerrick Creek area? A. It was rough.

Q. It was rocky?

A. Yes, it was rather bumpy.

Q. He wanted to work back on that and get it later in the spring when the temperatures were higher, and there would be less breakage, didn't he?

A. That was his idea, and the argument was over the fact that he might not be able to get in there in the spring.

(Deposition of Roy S. Crawford.)

Q. Did you consider it unlikely that he could get back to that area before it thawed out?

A. There was a good possibility. Whatever plans he gave me at that time, I know, entered into it.

Q. Is it your testimony that Tope could have moved the operation to Big Delta and done it if he wanted to?

A. He could have moved. We didn't attempt to control where he moved to. We might argue about the possibilities in the area.

Q. And you did argue about it? A. Yes.

Q. And the result was that he didn't move, did he?

A. He stayed and went through Yerrick Creek. [629]

"Q. Mr. Crawford, did you terminate your employment with Oaks in 1954?

A. It was in the tail end of 1954, or the first of 1955.

Q. Have you worked for them since?

A. No.

Q. Are you an engineer by profession?

A. By training, yes.

Mr. Nesbett: That is all.

Mr. Rohrback: I have just a few questions.

(Deposition of Roy S. Crawford.)

Redirect Examination

By Mr. Rohrback:

Q. You mentioned that some of your arguments or discussions with Tope were concerned with whether he could get payment for the work done by him. What did you mean by that?

A. Well, I know at one time in an area somewhere near this Yerrick Creek portion that he had gone through and just piled up the debris in a pile, and the Army Engineers objected to it, and said we would have difficulty in getting payment for that type of clearing.

Q. Then what you have reference to is whether the work he was doing was acceptable to the Army Engineers?

A. Right.

Q. Now, you indicated at one time that when you used the word "payment," you meant progress for his work?

A. Yes. [630]

Q. In other words, how much he had completed satisfactorily?

A. That is right.

Q. Now, you left us kind of up in the air. You said the fight you had after Mr. Tope was off the job was a one-sided fight. Would you describe what you mean by "one-sided"?

A. Well, I hardly knew I was going to get hit, and after I got hit, I didn't know much; I had a matter of seconds to react.

Q. In other words, you were hit by Tope?

A. That is right.

(Deposition of Roy S. Crawford.)

Q. Then there was reference to a situation which would have happened if Tope had hired Duke Oaks as his foreman. You said that it would have been all right to carry him through Oaks' payroll, but that his wage would have been charged to Tope, is that correct? A. That is right.

Q. Whereas Abbott was being paid in full by Oaks to run the line, and you were merely donating his extra time to Tope? A. Right.

Q. But the decision of which to use was Tope's?
A. Yes.

Mr. Rohrbach: That is all."

Mr. Dunn: That is all redirect examination. Beg your pardon. Recross-examination by Mr. Nesbett on page 58: (Reading):

Recross-Examination

"Q. This argument over the quality of the work concerned, among other things, the berm that was to be tramped down to a specified [631] height?

"A. Yes, it is in the contract.

Q. One of the arguments, at least, occurred over Tope's desire to leave the berm until more of the snow had melted so that it could be tramped to the contract specification level; it would be easier then than to tramp it to that level with a lot of snow and low temperature, isn't that right?

A. There was an argument on how to tamp the berm down, and quite a bit of argument over whether it could be done better in the winter or wait

(Deposition of Roy S. Crawford.)

until later in the year, when you had matchsticks sticking up in the air.

Q. The Army inspectors, when they saw the high berm, were concerned or felt that maybe Tope felt that he had completed the clearing according to specifications—weren't they?

A. That would be the fundamental reason, yes.

Q. Tope's contention was that he wasted hours in cold weather and deep snow trying to tramp it down then when he could do it much faster after the snow had somewhat disappeared—wasn't that his contention?

A. That would be his contention.

Q. But the result of the whole argument or difference of opinion was that Tope had to go along and tramp it right at the time he cleared it, wasn't it?

A. If we had any hope of getting payment, yes.

Q. He wasn't permitted to wait until some of the snow had [632] melted and the tramping could be accomplished according to the way he thought it might be accomplished, was he?

"A. By "permitted," I don't understand.

Q. Well——

A. He made his own decisions.

Q. Well, he didn't do it the way he wanted to do it, did he?

A. The way he wanted to do it before the argument?

Q. Yes. He didn't do it that way, did he?

A. No."

(Deposition of Roy S. Crawford.)

Mr. Dunn: Redirect Examination by Mr. Rohrbach, at page 60.

Redirect Examination

“Q. The persons who had to be satisfied when you use that word were the Army Engineers?

A. In the end result, yes.

Mr. Nesbett: The end result was before final acceptance?

The Witness: Yes.”

Mr. Dunn: Your Honor, having read that, I'd like to offer it, please.

The Court: Very well.

Mr. Nesbett: No objection, your Honor.

The Court: Roy S. Crawford. That is Exhibit R.

Mr. Dunn: Your Honor, if I may call my next witness, I'd like to call Mr. Roy Lucas, please. I assume he is out there; he has been subpoenaed. Your Honor, while we are waiting for this witness, I made demand, if you recall, for the tax returns of [633] Mr. Tope and Stuart Construction Company, Inc., for the years 1953 and 1954, and I would like to have those produced, if I may.

The Court: Very well. Are they available?

Mr. Nesbett: I have given him the returns for '53 and '54 that Mr. Tope has furnished to me and they're——

The Court: For the corporation?

Mr. Nesbett: They are for Stuart E. Tope, your Honor, and I have asked him if there was any corporate return. Mr. Tope says that he doesn't know whether the accountant made a return on behalf of

the corporation or not. These returns do contain the income he received from Oaks Construction Company himself, however, the payroll slips.

The Court: All right.

ROY LUCAS,

being first duly sworn upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Roy Lucas.

Q. Where do you live, Mr. Lucas?

A. 3306 Wyoming Drive, Spenard.

Q. Mr. Lucas, are you acquainted with work that is commonly designated the Haines pipeline, and particularly with the clearing of right of way between roughly, between Big Delta and Tok Junction? [634]

A. I worked on it.

Q. Are you—then you are familiar with it?

A. Yes.

Q. You worked on that section between Big Delta and Tok Junction, is that right?

A. That's right.

Q. What did you do?

A. I was a heavy duty mechanic.

Q. Did you take care of the cats that Tope had on the job?

A. Yes.

Q. How long did you work on that section?

A. I can't give you the exact dates but I think they were from sometime the first part of February until the first part of May.

(Testimony of Roy Lucas.)

Q. Of what year, please? A. '54.

The Court: February until May, did you say?

A. Yes.

Q. Now, during that period of time, did you also have occasion to service any cats that belonged to McLaughlin? A. Yes.

Q. When you first came on the job, how many cats did Tope have? A. Three.

Q. How many of them were running?

A. The morning I got there, I think there was one running. [635]

Q. Well now, during the time that you were on the job how long did all three of those cats run at the same time?

A. Well, only part of one day did I have all of them running.

Q. And with the exception of part of one day, one or more of them was inoperative, is that correct? A. Yes.

Q. Well, how about McLaughlin cats? Compare the maintenance required with those cats with the maintenance required on Tope's cats?

A. It was a lot less.

Q. Did you have occasion to talk to Tope from time to time while you were on this job?

A. Yes.

Q. Did he voice any concern over completing this job? A. Yes.

Q. Was he concerned over getting it done on time? A. Yes, he was.

(Testimony of Roy Lucas.)

Q. Did he voice any concern over the expense of completing it? A. Yes.

Q. Was he concerned over it being expensive?

A. Yes.

Q. Well, how did Mr. Tope react to the services that you rendered?

A. As far as I know, Mr. Stuart and I always got along good.

Q. He received your services, accepted them, did he not? A. Yes. [636]

Q. Did he voice any opinion as to whether or not he was glad to have them or whether or not he re-ented them?

A. When he came to the job, Mr. Stuart told me that he was glad I came out.

Q. Did you hear Tope voice any opinion as to how he was going to come out on this job in the long run? A. No, I did not.

Mr. Nesbett: I object to that, your Honor, as the witness being entirely incompetent to answer; he was a mechanic working on the cats. He had not date, time laid or any other foundation.

The Court: He has already answered, but he would be competent to say what Mr. Tope had said to him about the job. That is what counsel asked him. Of course he can ask him to express an opinion about how he'd come out on the job and he couldn't answer. By saying "yes"; he expressed an opinion; he would have to say what he said.

Mr. Nesbett: The point I was making, your

(Testimony of Roy Lucas.)

Honor, a broad side statement, without any time, place or persons present.

The Court: You were right about that. However he said he did not, so that ends the matter.

Mr. Nesbett: Did he say that?

The Court: At least that is my recollection.

A. That is right. I said "no."

Q. Did Tope tell you that he was afraid he was going to lose a [637] lot of money on this job?

A. He was concerned over it, yes.

Q. Did he tell you that?

A. Well, we used to talk about the way the operation was going and the hard luck we were having.

Q. And did he voice his concern at that time?

A. He was afraid he wasn't going to come out.

Q. Did Mr. Tope give you any orders while you were on that job? A. Yes.

Q. Did he tell you how to fix his equipment?

A. No, he just told me the equipment that was down and I went to repair it.

Q. Did he tell you where to go and what to do?

A. He told me where the equipment was down. He never did tell me how to do it.

Q. But he would direct what equipment you would work on?

Mr. Nesbett: I object to the leading question, your Honor.

Mr. Dunn: It is leading.

The Court: Leading and calls for an opinion.

Q. Now, you testified, did you not——

(Testimony of Roy Lucas.)

Mr. Nesbett: I'll object to that, your Honor, on direct examination. That is cross-examination procedure but——

The Court: Counsel would have a right to refresh his memory about any matter that the testimony is pointing. You may do that. [638]

Q. You testified, did you not, that you were on this job from February to May? A. Yes.

Q. Were you working on Tope's cats periodically throughout that time? A. Yes.

Q. Did you get fairly well acquainted with them?

A. I didn't understand the question.

Q. Did you get fairly well acquainted with what condition, over-all condition those cats were in?

A. Yes.

Q. Do you know from what you observed of those cats whether or not they were in condition, proper condition for a winter job of this nature?

A. I think the cats were in as good a condition as they could have been.

Q. Well, what kind of condition were they in?

A. Well, when I got there, I would say they were in fair condition. The cats had worked before I got there.

Q. And they managed to run together one-half of a day, is that right?

A. That is right, that they all run.

Q. Do you think these cats could have handled that work if it would have been done in the summer-time?

A. They could have done it a lot better, yes. [639]

(Testimony of Roy Lucas.)

Mr. Dunn: No further questions, your Honor.

The Court: Mr. Nesbett.

Cross-Examination

By Mr. Nesbett:

Q. Who hired you, Mr. Lucas?

A. Carl Oaks.

Q. And did he send you down on the job?

A. Yes.

Q. Did you know Tope before you went down on the job?

A. Yes, but I hadn't known him very long.

Q. And did Mr. Oaks give you any instructions as to whether you were to take any orders from Tope before you went down?

A. I just understood that I was.

Q. Hired by Mr. Oaks? A. Yes.

Q. To go down and repair the cats of Tope, is that correct?

A. And stay there and maintain them.

Q. Now—that is all.

Redirect Examination

By Mr. Dunn.

Q. When Mr. Oaks hired you, did he tell you to report to anyone?

A. I wasn't to—just to report to the job, that I knew Vince Abbott was there in the capacity as supervisor.

Mr. Dunn: Will you read his answer back? I didn't quite catch it, please. [640]

(Testimony of Roy Lucas.)

A. I was just to report to the job and Vince Abbott was to be my supervisor.

Q. And did Oaks tell you to report to Tope?

A. I don't remember that.

Q. But he did tell you to go to Tope's spread, didn't he?

A. Yes. I was to report to that job.

Q. And Tope told you what work to do?

A. Yes.

Mr. Dunn: No further questions.

Recross-Examination

By Mr. Nesbett:

Q. Didn't you say that Tope told you where the cats were when they were down? A. Yes.

Q. He didn't tell you how to do your work, did he? A. No.

Q. Did he give you direct orders? Did he follow you around and tell you what to do and how to do it? A. No.

Mr. Nesbett: That's all.

Redirect Examination

By Mr. Dunn:

Q. Well, did you get the impression that Mr. Tope thought you knew enough to know how to fix these cats once he told you that they were down? [641]

A. I distinctly remember that Mr. Stuart told me that he was glad that I was there and he appre-

(Testimony of Roy Lucas.)

ciated what I was trying to do under the conditions we had.

Mr. Dunn: No further questions.

Mr. Nesbett: That's all.

The Court: That is all of this witness?

Mr. Dunn: Yes, sir. Your Honor, I have another witness that I asked to be here at 11:00 o'clock. I am interested in these tax returns. I wonder if I can call Mr. Tope as an adverse witness for the purpose of identifying these tax returns?

The Court: Yes, you may.

Mr. Dunn: I'd like to do so, please.

(Mr. Lucas left the witness stand. Mr. Tope resumed the witness stand.)

Mr. Dunn: The last witness may be permanently excused, may he, your Honor?

The Court: Yes, if you gentlemen wish.

Mr. Nesbett: Yes.

STUART E. TOPE

Direct Examination

By Mr. Dunn:

Q. Mr. Tope, you have already been sworn and testified in this entire matter, haven't you?

A. Yes, I have.

Q. Mr. Tope, did Stuart Construction Company, Inc., file a tax return for 1953 and 1954? [642]

A. We would have—I do not know but we would have to check with the accountant.

(Testimony of Stuart E. Tope.)

Q. Well, you would have signed it if it would have been prepared?

A. But I can't recall whether I did or I didn't.

Q. You heard me demand those tax returns. Did you not demand their production in this action?

A. I believe you asked my attorney.

Q. Well, you heard it, did you not?

A. I believe I did, yes.

Q. Well, did you look for those tax returns?

A. No, I didn't.

Q. Did you try to find them?

A. No, I didn't.

Q. Well, I repeat my demand for their production then, your Honor.

The Court: Who would have the copies, his counsel—find out where it is.

Q. Where would they be, Mr. Tope?

A. In Fairbanks.

Q. In Fairbanks? A. Yes.

Q. Does Stuart Construction Company maintain a business office in Fairbanks?

A. The accountant was in Fairbanks.

Q. Does Stuart Construction Company maintain a business office in Fairbanks? [643]

A. No, we do not.

Q. And you do not? A. And I do not.

The Court: What Mr. Nesbett said, the return made by Mr. Tope would cover the identical matters that could have been covered by the Construction Company.

Mr. Dunn: No, sir, he merely said that these re-

(Testimony of Stuart E. Tope.)

turns cover the income of Stuart, that Stuart Tope received from Oaks. That would be this drawing account or salary.

The Court: I see. Not all the income.

Mr. Nesbett: That was all the income there was to him.

The Court: I see.

Mr. Dunn: Yes. All that was reported.

Q. Mr. Tope, I hand you these two instruments and ask you if you can identify them?

A. Well, this is the withholding form from the Oaks Construction Company.

Q. Well, what is right under it?

A. And this is form 1040, U. S. individual income tax return.

Q. For what year please? A. 1954.

Q. For what person or persons?

A. Pardon.

Q. For what person or persons?

A. Stuart E. Tope. [644]

Q. And the—do you have another form 1040 there?

A. And here is the Alaska individual tax return for 1954.

Q. For the same person?

A. For the same person, yes.

Q. Do you have another form 1040 there?

A. This is an amended return copy. This is not a 1040 form—yes, sir, it is. Beg your pardon.

Q. You do have another form 1040, don't you?

A. Yes.

(Testimony of Stuart E. Tope.)

Q. For what year is that? A. '53.

Q. For what person? A. Pardon.

Q. For what person or persons?

A. Well, this is Stuart E. Tope and Bertha Tope.

Q. Now, Mr. Tope, I direct your attention to schedule D attached to the 1953 return, and ask you——

The Court: That is '53 or '54?

Mr. Dunn: '53, sir.

Q. ——and ask you if you see any reference there to the—I'll strike that. I beg your pardon, your Honor. It is Tope Construction Corporation. Is that some other corporation other than Stuart Construction Company? A. Yes.

Q. I just noticed that now. I am sorry. That doesn't have anything to do with Stuart Construction Company? [645] A. It does not.

Q. I withdraw the question. Mr. Tope, I invite your attention to Schedule D——

Mr. Dunn: Your Honor, I beg your pardon, I have wasted time. The reference is to Tope Construction Company, not Stuart Construction Company. I misread it. I have no questions of this witness.

Cross-Examination

By Mr. Nesbett:

Q. You were asked over a year ago in your deposition to make all the records of Stuart Construction Company available to Mr. Dunn, weren't you?

A. Yes, sir.

(Testimony of Stuart E. Tope.)

Q. You did that, didn't you?

A. To the best of my knowledge, yes, sir.

Q. You were not asked anything about an income tax return from the corporation as such until the commencement of this trial, were you?

A. No, I was not.

Q. Were all these financial statements and ledgers and so forth, that have gone into evidence concerning Stuart Construction Company, prepared by the accountant Marlor in Fairbanks?

A. That is correct.

Q. Then if you have no income tax report of Stuart Construction Company, as a corporation, in the records, you have, would they [646] be in the possession of Marlor to the best of your knowledge?

A. To the best of my knowledge, yes.

Mr. Nesbett: That's all.

The Court: Is that all of this witness?

Mr. Dunn: Yes, sir. No question.

The Court: Very well. Let the Court stand recessed for ten minutes.

(The Court recessed at 11:00 o'clock and reconvened at 11:10 o'clock.)

Mr. Dunn: I'd like to call Mr. James Beall, your Honor.

The Court: Would you give me the name again; James Beall.

Mr. Dunn: Yes, sir, Beall. B-e-a-l-l, I believe is the way he spells it.

JAMES W. BEALL,

being first duly sworn, upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Jim W. Beall.

Q. And where do you live, Mr. Beall?

A. 3908 Lois Drive, Spenard.

Q. Where do you work?

A. Spenard Plumbing.

Q. Lois Drive is where?

A. In Spenard. [647]

Q. Just adjacent to Anchorage? A. Yes.

Q. Mr. Beall, are you acquainted with the work of clearing the right of way on what is commonly known as the Haines pipeline, and particularly with that section between Big Delta and Tok Junction?

A. Not too acquainted with that section, no.

Q. How about the section immediately to the southeast of it, between Tok Junction and the Canadian border? A. Yes.

Q. Are you acquainted with that? A. Yes.

Q. Was that McMann's section? A. Yes.

Q. Did you do any work on that section?

A. Yes.

Q. In the course of doing that work, did you have occasion from time to time to observe Mr. Tope here? A. Just right at the beginning.

Q. At whose beginning, yours or his?

A. Well, we both started at the same point.

Q. And went in opposite directions?

(Testimony of James W. Beall.)

A. Yes.

Q. Well, did you see his equipment when he brought it on the job?

A. Shortly afterwards on the job. [648]

Q. What kind of shape was it in?

A. I wouldn't say very good shape.

Q. Was it new equipment or old equipment?

A. No, it is old.

Q. Did you observe any repairs to it that had to be made initially?

A. I didn't actually see them, no.

Q. Did you ever observe his cats at night?

A. You mean was I out there?

Q. Did you ever see his cats at night?

A. No, not particularly at night, no.

Q. Well, not particularly but at all did you ever observe his cats at night?

Q. Well, not out on the job, no.

Q. Well, any place?

A. Well, during the day I did.

Q. Did you ever see them at night any place?

A. Well, as far as being out there, no.

Q. Did you ever hear any of his cat skimmers make any comment about the condition of the equipment that they were operating?

Mr. Nesbett: I'll object to that, your Honor, as calling for hearsay.

The Court: Well, it would of course. The question is: Did he ever hear them make comment. He can answer that but he can't tell what they said. He can say whether he heard a comment but he

(Testimony of James W. Beall.)

can't say what the comment was, so it would be futile, I [649] suppose——

Mr. Dunn: I think that is argumentative, your Honor, really because the contention is, I take it, whether or not these people were Tope's employees or not.

The Court: Well, now, if he heard Mr. Tope make comment, now you know that that would be hearsay and the Court have it from someone else.

Mr. Dunn: But I would think if it was Tope's employees——

The Court: No, sir, they would not be competent or authorized to act for him and make any comments of that sort.

Mr. Dunn: I'll pass the question then.

Q. Did McMann's cats have very many breakdowns? A. No.

Q. How many cats did he have? A. Two.

Q. Was either of them ever down for as long as a full day? A. Yes.

Q. Were both of them ever down for as long as a full day? A. At the same time?

Q. No, during the course of the job?

A. One cat was down for a period of, oh, four to five days.

Q. With that exception, was either of those cats down as long as one day? A. No.

Q. Did you have any conversations with Mr. Tope? [650] A. I talked with him, yes.

Q. Did you ever hear Mr. Tope make any complaint about the work on his section of the pipeline?

(Testimony of James W. Beall.)

A. Yes.

Q. What did he complain about?

A. Of extra work that he had to do.

Q. Work over and beyond what?

A. It was extra work beyond his contract is all I know.

Q. Did you ever hear Mr. Tope make any boasts about his contract?

Mr. Nesbett: Your Honor, I will object to these general, broad questions, without him laying some foundation, where it was at least. It just calls for almost innuendo.

The Court: That, of course, would call for a conclusion as to whether he made a boast or not, that would be an opinion on the part of the witness. He can say what was said by Mr. Tope. However, counsel is right that there ought to be some time fixed when he made the statement.

Q. Well, with respect to the area of the Haines pipeline, between Big Delta and the Canadian border—well, here, I'll retract that. Where did these conversations that you had with Mr. Tope take place?

A. Tok Lodge.

Q. During what period of time? [651]

A. In the evening.

Q. During what months?

A. Well, it would be January.

Q. Of what year? A. 1953.

Q. Are you sure of that?

The Court: I think you can correct the witness.

A. January of '54. It was the winter of '53-'54.

(Testimony of James W. Beall.)

Q. And at that time, or during any of those conversations, did Mr. Tope ever make any statement to you about how long it would take him to complete his contract? A. No.

Q. Did he ever make any statement to you about how much money he expected to make under his contract?

A. I heard it but I—not at the particular time I am talking about.

Q. Beg your pardon.

A. I say I have heard the statement, yes.

Q. You have heard Tope make the statement?

A. Yes.

Q. Where? A. In the Lodge.

Q. During the same period of time?

A. No.

Q. When was—when did he make the statement? [652]

A. Well, it was in the evening just in the Lodge I have heard him make it.

Q. During what month?

A. Well, it would have to be during January.

Q. What did he say?

A. You mean the words he said, I heard him say?

Q. Yes. As best you remember.

A. Well, that he expected to finish the job soon and make some money on it.

Q. Do you have any connection with Carl Oaks at all? A. No.

Q. Where are you employed now?

A. Spenard Plumbing.

Mr. Dunn: No further questions.

(Testimony of James W. Beall.)

Cross-Examination

By Mr. Nesbett:

Q. Would those statements that you recall, Mr. Beall, have been made in the early part of January?

A. In January, yes.

Q. Would it be in the early part?—When did you start to work on your job, about the time Tope did?

A. Yes.

Q. That would—if I told you that the evidence here indicates that his work was started about January 3, would you say that that was approximately the time your spread started? [653]

A. Well, I was there before Christmas, but actually work didn't start until after the first of the year.

Q. Did you see Tope there before he started to work too? He was at the Lodge too, wasn't he?

A. Yes.

Q. And can you place the statements you may have heard or that you say you heard Tope make with respect to whether they were the latter part of December or early part of January?

A. I'd say early part of January.

Mr. Nesbett: No other questions.

Mr. Dunn: No questions, your Honor.

The Court: That is all.

(Mr. Beall left the witness stand.)

Mr. Dunn: Your Honor, we also have the deposition of Vincent H. Abbott, taken on behalf of the

defendants, on August 2, 1958, in Lathrop Wells, Nevada. I'd like to read that please.

The Court: Very well. August 2, that is quite recent.

Mr. Dunn: Yes, sir.

The Court: That is Vincent?

Mr. Dunn: Vincent, V-i-n-c-e-n-t H. Abbott, A-b-b-o-t-t.

The Court: Where was it taken? You told me but I didn't—

Mr. Dunn: At Lathrop (L-a-t-h-r-o-p) Wells, Nevada.

The Court: Thank you.

Mr. Dunn: Do you have a copy of this, Mr. Nesbett?

Mr. Nesbett: No. Your Honor, we weren't represented at [654] that deposition, and we have not gotten a copy. I was wondering if I—

The Court: Well, if there is one here, you sure can have it. Do you know whether there is a copy of it here?

Mr. Dunn: The original should be here, sir.

The Court: Oh, you have—you are reading from a copy?

Mr. Dunn: Yes.

The Court: If you are reading from a copy, let Mr. Nesbett have the original.

Deputy Clerk: If I can find it.

Mr. Dunn: Reading from page 2, the second paragraph, beginning at that page:

“Butcher & Dunn, Esqs., and Kahin, Carmody & Horswill, Esqs., appeared by Pinckney M. Rohr-

back, Esq., for and on behalf of defendants; there was no appearance for or on behalf of the plaintiffs.

Mr. Rohrback: This is the deposition of Vincent H. Abbott, being taken pursuant to notice of time and place, having been previously given, and taken at the Bongberg Cafe, Lathrop Wells, Nevada, commencing at 6:10 o'clock, p.m., on Saturday, August 2nd, 1958. I would like to further state that no attorney has appeared on behalf of the plaintiff at this deposition, nor have I, as attorney representing the defendants here at this deposition, been advised whether there will be any such representation or not. I arrived at the location for the taking of the deposition at [655] approximately five fifteen p.m. on this date and Mrs. Butterfield, the court reporter, advises me that she arrived very shortly prior to that time, and no attorney has arrived since that time up to the time of commencing this deposition to represent the plaintiff. We are therefore proceeding with the deposition, and I will state that this is the deposition of Vincent H. Abbott.

DEPOSITION OF VINCENT H. ABBOTT

Direct Examination

By Pinckney M. Rohrback, Esq.

Mr. Dunn: Beginning at page 3, Mr. Nesbett, will you be kind enough to read the answers.

"Q. Will you please state your full name?

A. Vincent Henry Abbott.

Q. And what is your address, Mr. Abbott.

A. Lathrop Wells, Nevada.

Q. You were subpoenaed to attend this deposi-

(Deposition of Vincent H. Abbott.)

tion as a witness were you not? A. Yes.

Q. Mr. Abbott, by whom are you employed here?

A. With I. L. Kroft and Son, Inc.

Q. What is their address?

A. It is Box 428, Newhall, California.

Q. Is there any likelihood that you will be in the Territory of Alaska, which now is the new 49th State, during the month of August, 1958?

A. Definitely not. [656]

“Q. And is there any possibility of your being up there even at any time during the rest of this year? A. No.

Q. Now, Mr. Abbott, were you ever employed by the Oaks Construction Company to work on the pipeline contract that company had between Haines and Fairbanks? A. I was.

Q. When did you arrive in Alaska for that job?

A. Well, I didn't go up for that job. I checked in at Anchorage, and Carl said he had a job at the pipeline for me, to check in with Roy Crawford.

Q. By 'Carl' you mean Carl Oaks?

A. Carl Oaks.

Q. Approximately when was this?

A. The dates are a little off. I would say it was around the 16th of February, something like that—I am not positive on the day.

Q. In other words, it could be off a day or two either way?

A. Yes, it could be off more than that as far as that is concerned.

Q. What year was that? A. It was 1954.

(Deposition of Vincent H. Abbott.)

Q. Now did you subsequently check in with Mr. Crawford? A. Yes, I did.

Q. And where was that? [657]

“A. Fairbanks, Alaska.

Q. And where were you sent, in reference to this pipeline job?

A. Well, I left Fairbanks, Alaska, to go to Scotty Creek. That would be the south section of the job that they had at the time. Actually, it was McMahon's section.

Q. I wanted to ask you, were you familiar, and are you familiar with the area from Haines to Fairbanks through which the pipeline was to run?

A. Very much so, yes. I have been all over all three sections of the job.

Q. You refer to sections, what were these sections consisting of, in reference to distances and locations?

A. I would have to have a map to check the stationing on them but from Northway to Fairbanks was split up in three sections.

Q. Let me interrupt; would you start at Fairbanks?

A. From Fairbanks to Tok Junction was Miller's contract.

Q. May I ask you, would it refresh your recollection if I suggested—wasn't it Fairbanks to Big Delta?

A. I mean Big Delta, yes—I am sorry. Big Delta to Tok Junction.

Q. And who had that section?

(Deposition of Vincent H. Abbott.)

A. Stuart Tope.

Q. Stuart Tope? A. Stuart Tope.

Q. And the next section was? [658]

“A. From Tope’s section to Northway, or right close to Northway, was McMahan.

Q. Can you describe these sections? Were they approximately the same size or was one bigger than the other?

A. In length they were the same size, but the terrain was different.

Q. Do you know approximately how long each section was?

A. It was approximately—to get me within even ten miles of that I would have to have a map, but they were very large sections. I would say Miller had roughly under one hundred miles; Tope had—I think they were all under, slightly under one hundred miles.

Q. Can you compare those sections, from your knowledge, in reference to terrain and the difficulty of doing the work that was to be done, which I understand was clearing work?

A. It was clearing, yes, all of it. Well, I had been over all three of the sections. McMahan had the most difficult section, due to the fact that it was steep ground. Tope had the easiest section due to the fact of the size of the timber and steep ground, rocky area; and Miller, I would say, had the second hardest section. I have been over all three sections myself.

Q. Now you—I interrupted you when you indi-

(Deposition of Vincent H. Abbott.)

cated that you had first gone to Scotty's Creek, which was on—whose section was it? Was it Miller's? [659]

“A. It was on McMahon's.

Q. Excuse me; on McMahon's. Where did you go from there? A. On Dot Lake.

Q. And on whose section was Dot Lake?

A. Dot Lake was on Stuart Tope's.

Q. How long was the time between going to Scotty's Creek and the time you went to Dot Lake?

A. I was in Scotty's Creek two days; I left Scotty's Creek around the evening—around four-thirty, and arrived at Dot Lake roughly around eight-thirty or nine-thirty, something like that.

Q. Of the same day?

A. Of the same day, yes.

Q. Did you have a meeting then with Mr. Tope?

A. No, Mr. Tope came in—I arrived in Dot Lake roughly around eight-thirty. Mr. Tope came in at around nine-thirty or ten o'clock and I talked with him until around one o'clock in the morning.

Q. Can you tell me when you arrived what Tope's reaction was to your being sent to Dot Lake?

A. Yes, I can; he seemed to be very happy about it. In fact he told me he requested me to come up there.

Q. Was that to work on his section with him?

A. That is correct, yes.

Q. Now what was your position there on that job in reference [660] to Oaks Construction Company? What were you to do for that company?

(Deposition of Vincent H. Abbott.)

“A. I was to represent Oaks Construction Company as an inspector and a representative for them; and to help Tope all I could, any way I could, to get his job done.

Q. Now, can you tell me from your experience on this type of job, is it customary or not for the prime contractor to have an inspector on these jobs overseeing the work of the subcontractor?

A. That is the regular procedure.

Q. Now——

A. You must have a representative, a prime contractor must have a representative on any jobs he leases out, to my knowledge.

Q. What does he do?

A. More or less inspects work; sees it is taken care of in the right procedure and to help the subcontractor in any way you can. That has been our method with Oaks Construction Company and previously, with other contractors, I have been in that position.

Q. Is the purpose of that inspector or representative of the prime contractor in any way to boss or control the subcontractor?

A. Not necessarily, no. He is merely out there to take care of the interests of the prime contractor plus help the [661] subcontractor if he needs any help.

“Q. And is that what you were there for?

A. Yes, that is correct.

Q. Could you give us your experience in refer-

(Deposition of Vincent H. Abbott.)

ence to this type of work Tope was doing on this pipeline?

A. Yes, I can. Not in the same country, but in Washington and Oregon.

Q. First, what work was Tope doing there?

A. Tope had the clearing between Tok Junction and Big Delta.

Q. Clearing for the pipeline?

A. Clearing for the pipeline, yes.

Q. And what did that consist of? How did he do that?

A. It consists of knocking down the trees with cats, putting them in a row and making a firebern; that is what it amounts to, you had two lines like that. You put all your debris in a firebern—knocked it down and put a firebern behind it so if a spark got into the pile of debris you had it wouldn't jump over the firebern and go over into the forest.

Q. That word is 'firebern'?

A. That is what I call it.

Q. What you mean is you take all the debris and all the timber and pile it up in one pile alongside the clearing?

A. In a windrow.

Q. That is all right. I am sure they will understand where the trial is being held. Would you give us then your experience [662] in this clearing type work?

“A. This type of clearing—I never did this type of clearing with a bern before.

Q. Well, what has been your experience for-

(Deposition of Vincent H. Abbott.)

merly then in operating the same type of equipment, and in road work?

A. Well, I have been operating it since—oh, since 1924.

Q. And have you also had experience in construction problems?

A. Yes, that includes construction. All of our construction includes clearing rubble and dirt, plus brush, rocks, shooting rocks, etc.

Q. And you have been in that business since 1924?

A. I have been in supervision since 1930, and previous, before that on my own.

Q. And have you also operated the type of equipment that they were using on those jobs?

A. Yes, I have. I have operated D-8, DW-20, DW-21; they don't make a piece of equipment I haven't operated, and if you want some of the companies' names I have worked for I would be glad to give them to you.

Q. Yes, that would be helpful; would you give us the name of the companies you have worked for?

A. Well, how far back do you want to go? Do you want to go back to 1924?

Q. Yes.

A. City of Los Angeles, San Francisquite Canyon Dam, 1924. This is not going to be all in rotation; it will be approximately [663] on the dates, that is for sure. Peshasta Lumber Company, 1924. Do you want supervision or do you want my previous experience?

(Deposition of Vincent H. Abbott.)

Q. Well, could you give me three or four where you have had experience operating equipment?

A. I have been operating equipment all my life. I don't know where to start. I don't know how far back to go. Well, it would be Max J. Kuhn and Company.

Q. How long were you with that company?

A. Roughly around twelve years; their address is 120 Lake Street, Spokane, Washington.

Q. Would you give us companies with whom you have had supervision work?

A. That was supervising work.

Q. That was supervising work?

A. Yes; previous to that I was with Peter Kewit,

Q. And how long were you with that company?

A. About six months.

Q. Was that also supervising? A. Yes.

Q. Had you worked for Oaks Construction Company prior to the pipeline job? A. Yes.

Q. And what job was that on?

A. Solano job, that was the Indian River; that is where they [664] started the job.

Q. And how long had you been on that job?

A. It was four months on that job.

Q. What was the nature of that job?

A. It was some new location plus widening and grade changes.

Q. Now then, to get back to your arrival in Alaska for the pipeline job, when you arrived at Dot Lake, can you tell us what equipment Stuart Tope had on that job?

(Deposition of Vincent H. Abbott.)

A. Yes, he had two D-8 cats; serial numbers—I can't—I think one was——

Q. We don't need serial numbers.

A. There was two D-8 cats.

Q. Did he have any other service type equipment?

A. Yes, he had one Dodge service truck.

Q. What is a Dodge service truck for?

A. A Dodge service truck is something that is in the performance of servicing equipment, hauling, diesel, and greasing, etc.; it is normally to take care of the equipment, to service the equipment is what it actually does.

Q. Did he have any car on the job to transport employees?

A. At the time I arrived on the job he had one GMC pickup; I think it was about a—it was an old one that he used himself. Oaks Construction Company furnished practically all of the transportation for Tope's men. [665]

“Q. Now, can you describe the condition of this equipment and what Tope was doing with it when you first arrived at Dot Lake?

A. Yes, when I arrived at Dot Lake it was very cold; too cold to work. He had two cats of his own; one rented cat was laid off, and I suggested it was too cold to work; it was about—40 VA.

Q. First, excuse me if I interrupt; what was this equipment doing?

A. When I arrived on the job it was sitting idling day and night.

(Deposition of Vincent H. Abbott.)

Q. Idling?

A. Yes, and had been for two or three days before I arrived on the job.

Q. What was the condition of the equipment from repair and workability?

A. The condition of the equipment was very poor, what we call very, very poor—everything was pretty well used up.

Q. Were you familiar with this equipment that was Tope's, that he had on the job?

A. Yes, I was. He did have two cats and one blade the previous year.

Q. Was that on this other job you referred to?

A. On the Solano job, or Indian River job. [666]

Q. What was the condition of this equipment of Mr. Tope on the Indian River job?

A. Very poor. I think our office should have the record of this equipment, the records, etc., at Anchorage, which would prove my word on it.

(Off the record discussion.)

Q. Now, when you arrived on the job can you tell me whether Mr. Tope had any mechanic on the job at that time? A. No.

Q. What was the purpose of a mechanic on a job of that kind?

A. A mechanic is to maintain the equipment when it breaks down and to take care of it and to service things and see that things are taken care of before it happens.

Q. Now, did you have any discussion with Mr.

(Deposition of Vincent H. Abbott.)

Tope in reference to what he should do on the job or in reference to the equipment?

A. Yes, I suggested that he shut his equipment down until it got down to at least thirty below zero before he tried to start them up, and do any work, and he agreed.

Q. And was the equipment shutdown then?

A. Yes, it was.

Q. Now, whose decision was that? Was that yours or his?

A. I can not make a decision when I am just merely working for the prime contractor. All I can do is suggest to him as a friend or whatever you may call it. [667]

“Q. I see. Can you tell me from your experience in this type of thing, is idling considered a proper way to handle and maintain equipment?

A. Absolutely not.

Q. What does idling during cold weather, when the equipment is not being used, do to the equipment?

A. Well, in the first place it breaks the oil down idling, and there is no motor to my knowledge that is made for idling, no diesel or gas motor, to my knowledge.

Q. Now, after the equipment was shut down was anything else done to it?

A. No, not until these—until we tried to start the stuff up again.

Q. And then what if anything was done?

A. Well, I don't think there was anything done

(Deposition of Vincent H. Abbott.)

to it until we started up. One of the oil pumps, when we started it up—they didn't make provision for the oil pump to have condensation and it broke shear pin in the oil pump, which I fixed myself, and other than that there was nothing done to the stuff unless it broke down.

Q. Can you tell me approximately how long Tope's equipment was shut down?

A. Well, offhand I would say roughly about two weeks.

Q. During that time was there any work on the job on Tope's section? [668]

“A. Well, Tope had a few of the skimmers working on the equipment, but like I say, I don't know what they did or nothing. They didn't do nothing, it was forty or fifty below zero; They didn't work on it. They didn't work; they turned in their time and didn't work.

Q. What is a skimmer?

A. It is an operator.

Q. Now, at the time you started to operate the equipment again—first was there any other equipment that was added to it?

A. Yes. Carl Oaks sent one cat in of his own, for the south end of the job, to go with Tope's one cat he had. I should go back and tell you why I suggested to Tope shutting his cats down. He left one idling that broke a connecting rod in it and kicked the starting motor off. That is why I suggested shutting down. That left him one cat of his own on the job after he started up, and Carl Oaks dropped

(Deposition of Vincent H. Abbott.)

one cat off. I can't think of the number of it, but he dropped this cat off on the south end of the job to help Tope's work. One cat is not enough on that type of job. You generally worked three in a clearing of that type and we added three cats of McLaughlin's.

Q. In reference to these three cats of McLaughlin, can you tell me whether or not Tope had anything to do with the negotiations to bring those cats into the job?

A. To my knowledge, he did. The negotiations for them, price, [669] etc., but Don Heck would not trust him with the cats; Don Heck put me directly responsible for the cats he rented.

Q. Who is Don Heck?

A. Don Heck is general superintendent of the job the cats came off of.

Q. He is McLaughlin's superintendent?

A. He is superintendent for McLaughlin, yes.

Q. Can you tell us whether you had any conversation with Don Heck and Mr. Tope prior to these cats coming on to the job in reference to the rental of those cats?

A. No. Maintenance is the only thing Don Heck held me to, not the money part of it.

Q. Who handled the arrangements in reference to the money?

A. Tope, to my knowledge. The only thing I was responsible for was maintenance and seeing the cats were taken care of; the money was out of my hands.

(Deposition of Vincent H. Abbott.)

Q. Can you tell me whether or not Mr. Tope helped you bring these cats on to the job?

A. Yes, he did. He helped move all three of the cats up and made arrangements for the lowboy to move.

Q. What is a lowboy?

A. That is a truck and trailer that hauls them, or, heavy hauler or whatever you want to call it.

Q. Now when this additional equipment came on the job can you tell us whether or not Tope was able to work in more than [670] one location at a time on his spread?

“A. Yes, he was. He was able to work in two locations at the same time on his spread. That was the purpose in getting the other machines in. He was so far behind in his contract he had to get help.

Q. Where did the McLaughlin cats work at?

A. McLaughlin's cats started roughly one mile north of the Halfway House.

Q. And where did the other equipment that was Tope's and this other Oaks' equipment work?

A. They were also working about fifteen miles south of Dot Lake, working north.

Q. Would they be working towards each other then?

A. No, not when they first started. McLaughlin's cats started a mile north of the Halfway House and was working towards Big Delta to get that section. That was the section that they had to have first because the pipeline was coming through from Fair-

(Deposition of Vincent H. Abbott.)

banks. But they did, when they completed that section, they came back and worked south.

Q. Now, do you know who decided on the job as to where each of these were to be worked?

A. Tope, to my knowledge. We talked it over between us, where to put the equipment, the procedure, the progress we had to make, that he had to make in order to complete the job—for that reason. [671]

“Q. I see. Now, can you tell me who had charge of what men would be operating equipment at one spread and what men would be operating equipment at the other spread?

A. Well, Tope was contractor on it; Allred run the north spread.

Q. Who hired Mr. Allred for that?

A. I think he was recommended to Tope through someone in Fairbanks. Who, I don't know. To my knowledge Tope hired him.

Q. And what was his job?

A. Foreman; he was clearing foreman.

Q. Now, how many cats did he have in his group? A. Three; McLaughlin's cats.

Q. Now, at that time, who was acting as foreman of the other spread?

A. There was no foreman at the other spread.

Q. And how many cats were operating at the other spread at that same time?

A. Two to start with; three later on.

Q. At any time did they get four on that lower spread?

(Deposition of Vincent H. Abbott.)

A. No; they had three. They had one of Babler's. I am sure it was one of Babler's because it came out of—I could be mistaken on that, but he had another between Big Delta and——

Q. All right. Where were you working during that time, if you were?

A. I was working on both ends of it, checking the lines, boundaries, etc. [672]

“Q. Did you run any of the equipment yourself?

A. At various times, yes, when we was short of men, in order to help Tope out.

Q. Did Tope, himself, run any of the equipment? A. No.

Q. What did—how did he occupy his time?

A. Mostly chasing parts, etc.

Q. Now, did you at any time you were on the job where Tope was doing his clearing, hire or fire any men that were working there? A. No.

Q. Do you know of any employee of Oaks Construction Company who did hire or fire any men on this area where Tope was working?

A. Not to my knowledge.

Q. Did you in any way boss Tope during that period or give him orders as to where he was to work or what he was to do?

A. Absolutely not.

Q. Do you know of any employee of Oaks Construction Company during that period you were there who did boss him or give him orders?

(Deposition of Vincent H. Abbott.)

A. No; because he was in charge of that area; he would be the only one who could.

Q. Can you tell us generally from your knowledge, during the time you were there, who made the decisions as to where to [673] work and how to conduct the work and what operators to use?

“A. Well, that was entirely up to Tope. He used to ask me whichever—he used to ask me what I thought of this fellow and that fellow. I have worked with most all of the boys who were on the job in previous years, and they were all pretty good hands we had there, except for a couple of them, but he knew all of the boys himself, so, therefore, he didn’t ask me where to put a man. He put a man where he wanted to put him.

Q. Do you know a man by the name of Wilcox?

A. Yes; I do.

Q. Did he work there?

A. He worked on the job, yes.

Q. Do you know who hired him or had him there? A. Tope.

Q. We have already mentioned Allred, haven’t we? A. Yes.

Q. Do you know a man by the name of Spot Harlan? A. Yes; I do.

Q. Do you know who hired him?

A. Tope hired him.

Q. Was Mr. Harlan working on the job when you arrived?

A. Not when I arrived. He was off; like I say, the equipment was off. When the equipment started

(Deposition of Vincent H. Abbott.)

back up and Tope got McLaughlin's cats he went back to work for Tope. [674]

“Q. Do you recall an instance of there being a jeep hired or rented from Spot Harlan on that job?

A. Yes; I do.

Q. And what was the need for having that jeep?

A. Transportation for them, for Tope's men. Tope wasn't available at the time. He took the station wagon, which is the only vehicle they had, and he told Spot to go ahead and use his private vehicle to haul the men back and forth to work and he would get paid for it, and the time was turned in to Oaks Construction Company.

Q. Do you know at that time whether or not the employees of Tope were being carried on Oaks' payroll?

A. Yes; they were.

Q. Do you know the purpose of that, or is that something that isn't in your field?

A. To my knowledge, I know Tope in the previous year didn't have the money to pack his own payroll.

Q. Were you on the job at the time Tope left the job?

A. Yes; I was.

Q. And what were you doing at that time?

A. I was still in the same capacity. I was in charge of inspecting the job, running lines, etc., seeing that the job went right.

Q. Do you know approximately when it was that he left the job?

A. Not the date, no. It would be some time in April, but not the day. [675]

(Deposition of Vincent H. Abbott.)

“Q. That would be April of the same year, 1954? A. Yes.

Q. Were you operating any of the equipment at the time?

A. The day that Tope left I was running his cat, running line, which the Army engineers had not given us the line through on a tangent; that would be north of Dot Lake. There was a tangent. Gene Katter, which was timekeeper for Oaks Construction Company and engineer, was running line through. In other words, we didn't have any stakes to go by, all we had was a tangent of the road and I was running the cat because we didn't have an operator.

Q. What again is the purpose of running this line? A. For boundaries and clearing.

Q. Now, did you have a discussion with Tope in reference to his leaving, as to why he was leaving?

A. Yes; I did. He said his lawyer told him to take all of his stuff and come to town.

Q. Now, what equipment did he take with him?

A. He took his service truck, station wagon and his pickup with him.

Q. Can you tell us whether or not he left any of the equipment that he had with the service truck you mentioned previously?

A. No, nothing. Absolutely nothing.

Q. Did he take his cats with him? [676]

“A. No; he left his one cat. His other cat was

(Deposition of Vincent H. Abbott.)

at Scotty Creek at the time—or, the motor of his cat was, I should say.

Q. Was Tope's cat used in any way on the job after he left?

A. No, sir; we couldn't start it.

Q. Can you tell us how the job was going at the time Tope left? A. It was going very good.

Q. Were two spreads still being run?

A. Yes; there was a two-cat spread and a three-cat spread. The three McLaughlin cats were still going, and the company's cat and Babler's cat were still going.

Q. Wasn't Tope's cat also going if you were actually operating it?

A. Just for the one day. I hadn't operated it for two or three days at the time I took it. It was just sitting. That is why I took it to run line with. The fact is it wasn't in working condition.

Q. Can you tell us whether the job was up to schedule? A. No; it was behind schedule.

Q. Was it catching up because of these two spreads?

A. It was impossible to catch up when I arrived on the job. It was impossible to catch up when I arrived on the job due to weather and the previous method of operation.

Q. Now, have you ever seen or been given a copy of the agreement or contract between the Stuart Construction Company [677] and Oaks Construction Company for Tope's clearing of this area?

A. Yes; I have.

(Deposition of Vincent H. Abbott.)

Q. And how did you get a copy of that contract?

A. I can't remember who gave it to me, whether it was Tope or Crawford.

Q. It would be one or the other of those?

A. It would be one or the other of those, yes.

Q. When would that be, in reference to your being on the job?

A. Roughly, it was about a month after I came on the job when they were trying to get Tope to sign a contract and be bonded on the job.

Q. Did you have any conversation with Tope with reference to the contract or bonding?

A. No. No; that wasn't my job; it was Roy Crawford's.

Q. How did you get along with Tope?

A. Swell, up until the day he left. The fact is, my wife brought him up in our car to tell me he was leaving. We had no hard feelings between us all the way through up until the time he left.

Q. Can you tell us whether or not you did everything you could to help him while you were on the job?

A. I did everything in my ability and knowledge to help him.

Q. Have you seen Mr. Tope since he left the job?

A. Yes; I have. I have seen him a couple of times, in Anchorage [678] the following year, and he wouldn't even speak to me.

(Deposition of Vincent H. Abbott.)

“Q. Was Mr. Allred in any way under you, so that you were his boss?

A. Well, that depends on how you want to state or word it. Tope wasn't on the job too much, and I lined him up how the job had to look when it was completed, on the clearing. I didn't tell him how to do it or nothing, just what the company expected when completed, plus helping him all I could with previous experience up and down the line, the method they were using on the clearing.

Mr. Rohrback: That is all the questions I have. We are concluding this deposition at 7:00 o'clock p.m., and no attorney has appeared representing the plaintiff at any time during the taking of this deposition, nor has the plaintiff. One or two more questions, Mr. Abbott.

Q. When was the subpoena served? Showing you the original subpoena, which the court reporter has marked Exhibit A, I want to ask you if this was exhibited to you and served upon you?

A. Yes; it was.

Q. And when and where?

A. It was served at my home on August 1st, 1958.

Q. And approximately what time?

A. Approximately 7:00 p.m.

Q. And you responded to this deposition pursuant to that subpoena? A. Yes.”

Mr. Dunn: Whereupon, the taking of the deposition was concluded. [679]

Mr. Dunn: Having read it, I'd like to offer it, your Honor.

Mr. Nesbett: We have no objection, your Honor.

The Court: Very well.

Deputy Clerk: Defendant's Exhibit S.

The Court: This case will be suspended until 12:00 o'clock and the Court will adjourn until 1:30, to take up another matter.

(Recessed at 12:00 noon; reconvened at 1:30.)

CARL E. OAKS

being first duly sworn, upon oath, deposes as follows:

Direct Examination

By Mr. Dunn:

Q. Will you state your name, please?

A. Carl E. Oaks.

Q. Are you one of the defendants in this action, Mr. Oaks? A. I am.

Q. Do you know the other two defendants named, Butcher and Noonan?

A. I knew them. They are both deceased.

Q. They are both dead? A. Right.

Q. Where do you live, Mr. Oaks?

A. Anchorage, Alaska.

Q. What relationship did you have with Oaks Construction Company?

A. I was a partner.

Q. You have been sitting throughout these proceedings, have you not? [680] A. Yes, sir.

Q. And you are acquainted with the pipeline

(Testimony of Carl E. Oaks.)

and what part of it and so on that we are interested in, are you not? A. Yes, sir.

Q. Now, is Oaks Construction Company still in business? A. No, sir.

Q. What happened to it?

A. It went broke.

Q. Not in business now at all?

A. No, sir.

Q. What business are you now in, Mr. Oaks?

A. In the construction business.

Q. Are you in it for yourself or are you working for someone?

A. I am working for someone.

Q. Who are you working for?

A. Doddy Construction Company.

Q. How long have you been in the construction business? A. Since 1940.

Q. And you have done a good bit of contracting yourself, too, haven't you? A. I have.

Q. Now, will you explain to the Court what I think of as the chain of command with respect to this particular pipeline job. In other words, I want you to start with the prime contractor and go right on down to Mr. Tope, and tell the Court just how that was handled. [681]

A. This contract was awarded by the Corps of Engineers to the joint ventures of Williams, McLaughlin, Marwell.

Q. What did that contract call for, that prime contract?

(Testimony of Carl E. Oaks.)

A. That was to construct a pipeline from Haines, Alaska, to Fairbanks, Alaska.

Q. Well, now, was that for the complete construction?

A. That was for the complete construction.

Q. Complete installation of the pipeline?

A. Right.

Q. Go ahead. Excuse me for interrupting.

A. Williams Brothers subd from the joint venture of Williams, McLaughlin and Marwell the main pipeline. Oaks Construction Company subd from Williams the clearing and grading of the right of way.

Q. Well, let me interrupt you again. What did Williams Brothers sub from Williams, McLaughlin and Marwell?

A. The main pipeline, the construction of the actual pipeline.

Q. How much of it?

A. The entire pipeline.

Q. The entire six hundred miles?

A. Yes.

Q. And there was no difference in the work to be performed by Williams, McLaughlin and Marwell, and Williams Brothers, is that true?

A. Yes; there was. Williams just had the pipeline itself, and [682] Marwell had the building of all of the structures along the pipeline such as pump stations, the tank farms and such as that.

Q. Oh, I see, but Williams Brothers did sub-contract the entire line?

(Testimony of Carl E. Oaks.)

A. The actual pipeline, yes.

Q. Now, how many miles was that?

A. Approximately 600 miles.

Q. And then it in turn subcontracted to Oaks Construction Company? A. That is correct.

Q. How many miles?

A. 300 miles in Alaska, and 300 miles in Canada.

Q. Well, now, was that one subcontract or was that more than one?

A. That was two subcontracts.

Q. Was it—how much of it was in Alaska?

A. Approximately 300 miles.

Q. Was that all under one subcontract?

A. It was.

Q. All right. Let's forget about the Canadian section now. What duties did Oaks Construction Company have under its subcontract with Williams Brothers?

A. To clear and grade the right of way for the pipeline.

Q. The entire 300 miles? A. Right.

Q. And what did Oaks Construction Company do with the work it had to be done? [683]

A. Oaks Construction Company subd the clearing of the pipeline to three subcontractors and Oaks Construction Company done the grading themselves.

Q. Now, those three contractors, are those the three that have been mentioned here each of whom had about 100 miles? A. Yes, sir.

Q. But Oaks Construction Company retained

(Testimony of Carl E. Oaks.)

the grading? A. Right.

Q. You are familiar with plaintiff's Exhibit 1, the contract of December 17th, are you not?

A. Yes, sir.

Q. Did you help negotiate that contract?

A. I did.

Q. Did you ever waive any of the provisions of that contract?

Mr. Nesbett: I object to that, your Honor, as calling for a conclusion.

The Court: It would call for a conclusion but he can tell what he did and then we will have to say whether that was a waiver or not.

Q. What did you do, Mr. Oaks, with respect to the provisions of that contract once it was executed?

A. We went by the provisions of the contract.

Q. Are you acquainted with a bond provision in that contract? A. I am.

Q. Did you ever take any action with respect to the bond provision [684] in that contract?

A. We did.

Q. What did you do?

A. After we reached an agreement with Mr. Tope and Stuart Construction Company, for price and everything, he was to furnish a bond but he wanted to go to work but we said he could not go to work until he provided us with a bond. In the latter part of December of 1953 or thereabouts, I had a telephone call from Mr. William Olday, whom I knew. We had rented some equipment from him

(Testimony of Carl E. Oaks.)

from time to time, and Mr. Olday said that he was at the airport and he couldn't get in to see me; he was leaving for the states for over the Christmas holidays, but that he was going to help Mr. Tope, or get a bond for Stuart Construction Company.

Q. Well, now, had Tope gone to work at this time? A. He had not.

Q. Had Tope made any previous attempts to get a bond of which you knew?

A. I believe he had.

Q. Well, after Olday promised to get a bond for him, did he go to work? A. Yes; he did.

Q. Did he go to work before Olday so promised? A. No, sir.

Q. Well, did he get a bond? [685]

A. No, sir.

Q. Was any demand made on him for any bond after that? A. Yes; there was.

Q. Did he ever comply? A. No.

Q. Now, Mr. Oaks, I hand you this instrument and ask you if you can identify it?

A. Yes; I can.

Q. What is that?

A. It is the list of the mile post along the highway between Tok Junction and Big Delta at the various points along the job, roadhouses, creeks and so forth.

Q. Did you prepare that? A. I did.

Q. Did you see me give the original of that to the Judge to help him out? A. Yes, sir.

(Testimony of Carl E. Oaks.)

Q. Where did you get those mile posts? Where did they come from?

A. Off the mile post on the highway; either the mile post, and on every bridge the mile post is marked on the bridge.

Q. But those are the posts that are put up by the Road Commission, is that right? Those are not speed meter readings?

A. No; those are the mile posts on the highway.

Q. Do these mile posts and places, creeks and rivers, and so on, cover the section that Tope was working in? [686]

A. Yes.

Q. Do you know whether or not throughout that section that the pipeline fairly well parallels the road or not?

A. It pretty much parallels the road.

Q. There is some variation? A. There is.

Q. Now, you have heard reference, have you not, in this testimony to places like Tok Junction and Tok Lodge and Dot Lake and Yerrick Creek, places like that? A. Yes.

Q. Do you know whether or not those references refer to the highway or do they refer to the pipeline? A. They refer to the highway.

Q. The markings on the pipeline itself were of what nature?

A. They were designated in stations during construction. A station is a hundred lineal feet.

Q. Now, Mr. Oaks, did you place or cause to be placed along this pipeline supervisory personnel?

A. Yes; we did.

(Testimony of Carl E. Oaks.)

Q. Were some of those people Abbott and Crawford that has been testified about here for quite awhile? A. Yes.

Q. Well, what was there—were their duties—what was the duties of the supervisory personnel that you placed on this job?

A. Mr. Crawford was the General Superintendent. He had charge of [687] the work over the entire line. And then in each section of a line we placed another man to represent us in more or less a capacity of inspector and also to locate the clearing limits, so the subcontractor would know where to work.

Q. I ask you whether or not you know if the prime contract required that this pipeline be built according to certain specifications? A. It did.

Q. Did the contract that you—did the subcontract that you had from Williams Brothers require you to meet those same specifications?

A. Yes; it did.

Q. Did the subcontract that you gave Tope require him to meet the same specifications?

A. Yes.

Q. There was no difference there?

A. No.

Q. Well, what were those specifications generally, as best you remember them, with respect to clearing this right of way?

A. Generally speaking, the right of way was fifty feet wide. There had to be a thirty-foot cleared space for the pipeline itself. The remaining twenty

(Testimony of Carl E. Oaks.)

feet consisted of a five-foot fire break on the out and a berm of your cleared material.

Q. Were there any specifications as to how that berm was to be built? [688]

A. It was to be built——

Q. First, were there any specifications?

A. Yes; there was.

Q. What were they?

A. The berm was to be placed on one side of the right of way in a neat, orderly manner and compacted down.

Q. Well, did the specifications say how far it had to be compacted down or what do you mean by that? I don't understand you.

A. There was a reference in the specifications that was to be compacted down to no more than 18 inches in height, but that was never followed; it was just compacted down to whatever height that was practical.

Q. Now, did this subcontract that Oaks Construction Company gave Tope have a time limit in it?

The Court: Have a what?

Mr. Dunn: Have a time limit within which the work was to be completed, your Honor.

A. Yes; it did.

Q. What was that time limit?

A. 120 days.

Q. Was there any particular reason for specifying 120 days? A. Yes.

Q. What was that reason?

(Testimony of Carl E. Oaks.)

A. The reason was that we had to have the clearing done by early spring so that we could get our grading done ahead of the [689] pipeline laying crews.

Q. Who had a pipeline laying crew?

A. Williams Brothers.

Q. Well, now, was there a time limit in the subcontract you held under Williams Brothers?

A. Yes; there was.

Q. And each fellow had to get out of the other fellow's way, was that the size of it?

A. That is right.

Q. Well, do you know the practice in the construction business concerning the furnishing of men or equipment or both when a time limit on a subcontract is not being met? A. Yes.

Q. Was Tope meeting the time limit in his subcontract? A. No; he was not.

Q. Well, what is the practice?

A. If the general practice, if the subcontractor is not meeting his time limits or getting his work done properly, that the general contractor or whoever the subcontractor is subbing from, has to take steps to see that the work is completed as it should be and in the length of time it should be.

Q. Well, what kind of steps?

A. He has to see that he either gets—has to get more equipment, whatever that has to be done to get the job completed.

Q. Well, who pays for that equipment? [690]

A. The subcontractor.

(Testimony of Carl E. Oaks.)

Q. How is that handled?

A. It is handled numerous ways. Generally, the equipment is—if the subcontractor cannot get equipment himself the general contractor will have to get out and rustle equipment and get it on the job for him.

Q. Well, who pays for it?

A. The subcontractor.

Q. Well, how is the payment handled? That is what I am getting at.

A. Usually, the prime contractor will pay for it. If he has made the arrangements for the equipment, he has to pay for it.

Q. What does the prime contractor do after having paid for this equipment?

A. He deducts it from the earnings of the subcontracting——

Q. Is that called a back charge?

A. Right.

Q. Standard practice?

A. Yes; it is.

Q. Now, did you furnish any equipment or cause any equipment to be furnished for Tope?

A. Yes; we furnished equipment.

Q. Did you do it without consulting him?

A. No.

Q. How did you come to furnish equipment for Tope? What occasioned your furnishing him equipment? [691]

A. Through the chain of command, the way the general running of the office—word would get into

(Testimony of Carl E. Oaks.)

Anchorage usually that Tope would need—needed some equipment and then we would take steps to try to procure it for him.

Q. Do you know whether or not Tope requested additional equipment? A. Yes; he did.

Mr. Nesbett: What was that answer?

A. Yes.

Q. Did you hear Mr. Tope testify that \$25.00 an hour was a fair rental for a D-8 tractor?

A. Yes.

Q. From your knowledge of the construction business, what was the fair hourly rate for a D-8 tractor in 1954? A. \$18.50 an hour.

Q. Did you hire any cats in 1954 at that rate?

A. Yes; we did.

Q. Whose do you recall hiring if you recall any specific ones?

A. In particular, after McMahon had his portion of the pipeline cleared, we rented his tractors fully operated and maintained to help us with the grading, for \$18.50 an hour.

Q. Do you know what hourly rate is specified in the contract of December 17th, if any?

A. \$18.00 an hour.

Q. Did you negotiate that rate with Tope?

A. Yes; we did. [692]

Q. In 1954, to your knowledge, was \$25.00 an hour ever paid for a D-8 cat?

A. Yes; it was.

Q. Under what circumstances?

A. I believe in 1954, for just intermittent use,

(Testimony of Carl E. Oaks.)

for just short times, a day or two; the rate around Anchorage was \$25.00 an hour for a D-8 tractor fully operated and maintained, but on a job that lasted for any length of time, it was always considerable cheaper than that due to the fact that the machine worked every day and no lost time between jobs was the reason for the lower rate.

Q. The reason for the low rate was what?

A. There was no lost time between jobs if you had a long job; the machine worked every day.

Q. You mean moving the cat from one job to another?

A. Moving the cat from one job to another and also getting another job.

Q. I see. Do you know what the current rate—by current rate, I mean, now, in 1958 for a D-8 cat, is in this area?

A. Yes; however, that would depend on what—how old or what condition the tractor you were renting would be.

Q. Age hasn't something to do with the rent that is paid? A. Yes; it does.

Q. How does that affect the rent?

A. Well, a new piece of machinery will do more work and do it more [693] consistently than an old one.

Q. Then you pay for a new one? A. Yes.

Q. Were you acquainted with the equipment that Tope had? A. Somewhat.

Q. Did you hear Mr. Downs testify that it was used when he purchased it? A. I did.

(Testimony of Carl E. Oaks.)

Q. Did you ever have occasion to make use of that equipment prior to the pipeline job?

A. Yes; we did.

Q. You spoke of renting a cat fully operated and maintained, did you not? A. Yes, sir.

Q. Do you rent them any other way?

A. At times you rent a cat, what we call a bare rental; that is just the usual monthly rate and you—if a tractor is rented on a bare rental rate, the person renting it has to pay for all operational costs, parts, maintenance, operator wages; everything connected with—all expenses incurred in operating the tractor.

Q. Well, would you in the course of the construction business, do you ever rent a cat part bare and partly maintained, or is it one or the other?

A. The only other way that I have seen them rented is occasionally [694] a tractor will be rented operated or fully maintained, but the rentor would pay the operator.

Q. Are those the only three ways that you have encountered in the construction business?

A. Yes, sir.

Q. May I have Exhibit 2, please. Mr. Oaks, I hand you Plaintiff's Exhibit 2 and I ask you if you are familiar with that? Have you examined that or a copy of it before? A. Yes; I have.

Q. You have studied the copy that I have in my office, haven't you? A. Yes, sir.

Q. Now, what provision is made on Exhibit 2 for maintenance?

(Testimony of Carl E. Oaks.)

A. The only maintenance I see is lubricating maintenance, \$10.98.

Q. Does the cat normally require any maintenance—did I cut you off? A. Yes; you did.

Q. I beg your pardon. Finish your answer.

A. That looks like \$10.98 per week.

Q. \$10.98 a week for lubricating maintenance?

A. Yes.

Q. According to your experience, in the construction business, and with cats, is that a reasonable figure?

A. I believe it is much too cheap.

Q. In your opinion, what would it cost to maintain the lubrication [695] normally on a cat?

A. The lube oil and greases themselves would run from \$2.00 to \$2.50 a day. That would be the minimum it would run, plus——

Q. For each cat?

A. For each cat, plus there has to be a man doing this servicing and equipment to service it with.

Q. Well, what would his wages run per cat per day? Now, I want your considered opinion on this. I don't want you to figure it out in the light most favorable to you, just as though you were not a party on this case.

A. I would say wages—that depends on how many tractors a man is servicing and everything, but a minimum should be about \$2.00 a day, and it would be more than that with just these three tractors operating.

(Testimony of Carl E. Oaks.)

Q. It would be \$2.00 a day wages for——

A. Each tractor.

Q. For each tractor? A. Yes.

Q. Well, now, in the ordinary course of a construction project, does a cat require any maintenance other than that reflected on Plaintiff's Exhibit 2?

A. Well, it needs mechanical maintenance.

Q. Of what nature?

A. Repairs that the machine normally needs and maintenance it needs to keep it operating. [696]

Q. Is any provision made for that on Exhibit 2?

A. I do not see any, no.

Q. Well, I invite your attention to the first page of that exhibit and ask you if any provision is made there for parts? A. Yes; there is.

Q. Give me Plaintiff's Exhibit 9, please. How much provision is made for parts there?

A. \$3,232.98.

The Court: \$3,000.00, how much?

A. \$3,292. I beg your pardon, your Honor, it is \$3,232.98.

Q. I now hand you Plaintiff's Exhibit 9 and ask you if you are familiar with that?

A. Yes; I am.

Q. That is the settlement you made with the NC Company, is it not? A. Yes, sir.

Q. Now, did that relate to Tope's cats?

A. Yes; it did.

Q. Under that settlement, how much did you pay NC Company for parts?

(Testimony of Carl E. Oaks.)

A. The figure here "open account," which I would take it to mean parts——

Q. Well, you heard Mr. Downs testify on that point, didn't you?

A. Yes; he said it was parts—was \$5,465.97.

Q. Well, from your experience, in the construction business, and from your familiarity with this particular project, do you have [697] any opinion to form as to the adequacy of the parts estimate allowed in Plaintiff's Exhibit 2, the \$3,000 odd dollar figure?

A. I don't believe it was enough.

Q. At any rate you paid NC Company \$5,000.00, didn't you? A. Yes, sir.

Q. Well, now, then, Mr. Oaks, excluding parts, what, in your opinion, would be required for maintenance other than lubricating maintenance on cats on this job?

A. There would have to be, I am sure, some additional costs such as welder time.

Q. What do you need a welder on a cat for?

A. There are always parts of a cat or bulldozer breaking that has to be welded.

Q. I see. Go ahead.

A. Also oxygen, acetylene, which is used for welding, cutting, and that would be about it.

Q. You need a mechanic, it is, or did you testify? A. And a mechanic.

Q. In addition to the mechanic you testified to?

A. Yes.

(Testimony of Carl E. Oaks.)

Q. How much would that amount to a day a cat?

A. Well, of course, the poor shape the machine is in, the more it takes.

Q. Well, let me put my question this way: You are familiar with Tope's cats, didn't you so [698] testify? A. Yes, sir.

Q. You are familiar with the area in which they operated? A. Yes.

Q. And you know the time of year in which they operated? A. Yes; I do.

Q. Well, now, considering those factors, how much do you think it would cost to maintain them other than lubricating maintenance?

A. I would say a fair estimate would be \$20.00 a day per tractor.

Q. \$20.00 a day per tractor. Well, now, awhile ago you told me \$15.00. Why have you boosted it five?

A. This was a winter operation which I don't believe I took into consideration then.

Q. Oh.

A. And also on those three tractors it would be dividing one mechanic's time against three tractors, too.

Q. Now, Mr. Oaks, I hand you Plaintiff's Exhibit 3 and ask you if you are familiar with that?

A. Yes, sir.

Q. Well, now, I call your attention first to the last three pages of it. Now that sets for the alleged operating time of Tope's cats, according to Tope,

(Testimony of Carl E. Oaks.)

isn't that right? A. Yes, sir.

Q. From your knowledge of the job, nature of the work, time of the year and so on, do you have any opinion as to the accuracy of this exhibit, those—insofar as this exhibit relates to [699] operating hours? A. I don't believe it does, no.

Q. Well, do you have any opinion as to the accuracy of the exhibit?

A. I don't believe it is accurate.

Q. —all right. Well, what do you base that opinion on?

A. Well, apparently this is—these hours that each tractor worked for each week are the same hours that the men that were operating them were paid.

Q. Well, could cats operate that regularly on that job at that time of the year?

A. Not that job nor any other job.

Q. I now invite your attention to the first page of that same exhibit, Plaintiff's Exhibit 3, and you will notice that on that he claims a reasonable rental for a 2½ ton Dodge truck of \$800.00 a month. Now—that is a service truck, isn't it? You know the piece of equipment?

A. I have heard here that it was a service truck.

Q. Well, would a service truck rental be more expensive than that of an ordinary 2½ ton Dodge truck or not? A. No; it wouldn't.

Q. It would be—would it be less or?

A. Would be the same as—

(Testimony of Carl E. Oaks.)

Q. Would be about the same? A. Right.

Q. Now, in the course of your 18 years in the construction business, [700] have you ever had occasion to rent similar equipment?

A. Yes; I have.

Q. And what can you rent it for?

A. Used to be able to rent a 2½ ton truck for between \$300 and \$350 per month.

Q. Would that be true in 1954? A. Yes.

Q. Would you get a new truck or an old beat up truck for that amount of money?

A. That should be a new truck.

Q. Now, have you ever had occasion to rent a Ford station wagon or a piece of comparable equipment? A. Yes; I have.

Q. What is the reasonable rental for that per month?

A. I would say \$125 to \$150 per month.

Q. Would that be true in 1954?

A. Yes, sir.

Q. Can you do that now?

A. May I answer this by what I am doing now? I am renting a 1957 Mercury Sedan right now for \$150 per month.

Q. Now, you notice the next item, ½ ton GMC pickup for \$250 a month. Have you ever rented any pickups? A. Yes; I have.

Q. What is a reasonable rental for those?

A. \$130 per month. [701]

(Testimony of Carl E. Oaks.)

Q. Is that an old one or new one?

A. That would be a good one.

Q. Do you happen to know what the condition of the one that Tope had for which he is claiming rental?

A. No; I don't.

Q. Now, you weren't on this line itself too much, were you, Mr. Oaks?

A. Very little.

Q. Altogether you had some 600 miles of line to take care of. Right?

A. No, sir; I didn't take care of 600 miles of line.

Q. How much did you have, or what did you do?

A. I was in Anchorage the greatest share of the time of this entire project was on the way. We had supervision on the pipeline. Roy Crawford was general superintendent, and one of the partners was on it all of the time. I was not.

Q. Did you ever have any trouble getting your money from Williams Brothers?

A. At one time, yes.

Q. What happened there?

A. The Northern Commercial Company filed against our monies and Williams Brothers withheld payment to us.

Q. Well, why did Northern Commercial Company do that?

A. It was in regard to the monies that Stuart Construction Company or Stuart Tope owed Northern Commercial Company. [702]

Q. Did that hold up your progress payments from Williams Brothers?

A. Yes; it did.

(Testimony of Carl E. Oaks.)

Q. Especially the 100 miles that Tope was working on? A. No, sir; the entire job.

Q. The entire project? A. That's right.

Q. Would that be—I am confused. Again, is that 300 miles or 600 miles? A. 600 miles.

Q. I don't understand that. Now, I thought they were under separate subcontracts?

A. They were, but, they, nonetheless, held up the estimates on both contracts.

Q. Did you compute it or aid in the computation of the bid that you gave Williams Brothers for the subcontract you got? A. Yes; I did.

Q. In the course of doing that, did you examine the terrain to which the bid related? A. Yes.

Q. Did you examine that part of it that is within the Territory of Alaska?

A. Yes; I did.

Q. How did you go about examining the Alaska part of it?

A. We drove over the highway and had the drawings, specifications with us, and compared the terrain to each—as you went [703] along with what it showed on the drawings.

Q. Well, did you learn enough to form any opinion—— A. Yes.

Q. As? A. Excuse me.

Q. As to the difficulty of clearing the various sections in Alaska? A. Yes.

Q. In your opinion, who had the hardest section?

(Testimony of Carl E. Oaks.)

A. I believe the hardest section was the section just south of Fairbanks.

Q. Would that be Miller? A. Yes, sir.

Q. Well, who had the easiest?

A. The easiest section was from Big Delta to Tok, Stuart Construction Company.

Q. The one covered by this contract of December 17th? A. Yes.

Q. Did you hear Mr. Hancock testify?

A. Yes.

Q. Did you hear what he said with respect to creditors of Stewart Construction Company making claim against Oaks Construction Company for payment? A. Yes.

Q. Was his testimony true or false? [704]

A. It was true.

Q. Did such creditors make claims?

A. Yes.

Q. How many, do you know?

A. No; I don't. They were numerous.

Q. They were numerous? A. Yes.

Q. Did Oaks Construction Company ever have to redo any of the work that Stuart Construction Company did? A. No.

Q. Never had to redo it?

A. Not particularly, no.

Q. Well, now, in Paragraph 10 of your counter-claim, Mr. Oaks, you asked damages for—well, strike that. I have over covered it. Did you hear the testimony about these two lawsuits up at Fairbanks? A. Yes; I did.

(Testimony of Carl E. Oaks.)

Q. Are those still pending? A. Yes.

Q. You still have to defend them?

A. Yes.

Q. Did Stuart Tope, or Stuart Construction Company, or any officer or director or employee, or any person in any way associated with one or both of them ever have any authority whatsoever to pledge the credit of Oaks Construction [705] Company? A. No.

Q. Have you ever had—have you ever worked—well, you have worked as a subcontractor, of course? A. Yes.

Q. Have you ever had your payroll carried the way you carried Tope? A. Yes; I have.

Q. Do you know how frequently that is done in a construction business?

A. It happens frequently.

Q. Excuse me, one minute, please. Do you know anything about Stuart Construction Company or Mr. Tope leaving this pipeline job?

A. Yes; I do.

Q. Did he leave? A. Yes.

Q. Was the job finished when he left?

A. No.

Q. Did he leave his equipment there?

A. No.

Q. Now, you have previously testified that you weren't on that job very much, that you were down here in Anchorage. How do you know he didn't leave his equipment there?

(Testimony of Carl E. Oaks.)

A. That is what I was told by our field personnel.

Q. Did you ever have any conversation with Mr. Tope concerning [706] any of his equipment on that job?

A. Yes; I did.

Q. What was that?

A. The day that I received word that he had left the job, I talked to him on the telephone and asked if we could make arrangements for him to leave his service truck there for us to use until we could procure another one, and he said "no," he would not leave it.

Q. He refused to leave it?

A. Yes.

Q. Was the job completed at that time?

A. No; it was not.

Mr. Dunn: I have no further questions, your Honor.

The Court: Would you—court will stand recessed until ten minutes.

(Court recess at 4:00 p.m.; reconvened at 4:10 p.m.)

The Court: Mr. Dunn.

Q. (By Mr. Dunn): Mr. Oaks, Paragraph 13 of your counterclaim you ask damages based on an audit of the entire job to be completed in the future with respect to the time your counterclaim was filed?

A. Yes.

Q. Was that audit ever completed?

A. No; it wasn't.

(Testimony of Carl E. Oaks.)

Q. Are you forced therefore to abandon that part of your counterclaim? [707]

A. Yes; we are.

Mr. Dunn: Thank you.

The Court: Very well. You may cross-examine.

Cross-Examination

By Mr. Nesbett:

Q. Did you say, Mr. Oaks, that Oaks Construction Company is broke now? A. Yes, sir.

Q. How long has it been insolvent?

A. Oaks Construction Company done the last business in 1955.

Q. Were you bonded for this work that you undertook to do on the pipeline? A. Yes.

Q. What was the name of your bonding company? A. American Associated.

Q. American——

A. At that time I believe it was American Automobile Insurance Company.

Q. And in what amount were you bonded, sir?

A. \$225,000.00.

Q. Was that for all three of the sections?

A. Yes.

Q. There are other lawsuits pending over this pipeline project, or the contract you undertook to perform, are there [708] not? A. Yes.

Q. Mr. Oaks, what rate per lineal foot did you take your contract for clearance and grading on this pipeline for?

(Testimony of Carl E. Oaks.)

A. Thirty cents per lineal foot.

Q. You were getting thirty cents per lineal foot? A. Yes.

Q. And what were you to see was done as far as your subcontract was concerned?

A. Would you repeat that, please?

Q. What were you to accomplish under your subcontract?

A. We were to do all the clearing, all of the grading.

Q. And were you supposed to burn any of the trash? A. Yes.

Q. Now, do you recall approximately when you first discussed with Mr. Tope the possibility of his going on a portion of the line?

A. I believe the first discussion we had with Mr. Tope was either late in November or early in December of 1953.

Q. And you had several discussions with him, did you not, before this contract of December 17th was finally signed? A. Yes.

Q. Did you first approach him from the point of view of leasing his cats for use on that line?

A. I believe there was some discussion at the very beginning [709] about some rental. I don't remember the circumstances.

Q. Mr. Tope didn't want to enter into any such arrangement on that basis, did he?

A. I believe he wanted to take the job on a contract basis.

Q. And now—may I see the Exhibit 1. I show

(Testimony of Carl E. Oaks.)

you Exhibit 1; that is the contract or a copy of the contract, is it not, that we are talking about in this case? A. Yes.

Q. Have you ever observed that paragraphs 4 to 11 or 10 are missing in that contract?

A. No.

Q. Would you look at Paragraph 4—pardon me, Paragraphs 4 to 9?

The Court: Inclusive?

Mr. Nesbett: To 9, your Honor. No; not inclusive.

The Court: That is between 4 and 9?

Mr. Nesbett: Yes, sir.

The Court: 5, 6, 7, and 8?

Mr. Nesbett: Yes, sir.

A. They are not here.

Q. Had you ever noticed that on any of the copies we used in depositions or pleadings in this case? A. No; I had not.

Mr. Dunn: Your Honor, I think I can, if Mr. Nesbett wants me to, supply the original. [710]

Mr. Nesbett: Well, I suggest that when I get through if he has those paragraphs, I would like to see them.

Mr. Dunn: I never noticed it either.

Q. Now, you had discussed the matter of bond, the possibility or probability of Mr. Tope being able to enter a bond, obtain a bond, before the contract and after it was signed? A. Yes.

Q. And Mr. Tope said he would try to get one, didn't he? A. Yes.

(Testimony of Carl E. Oaks.)

Q. He made several efforts around Anchorage to get one before he went up on the job, didn't he?

A. Yes; he did.

Q. And he was unsuccessful in those efforts, wasn't he? A. Yes.

Q. Mr. Olday did say that he might consider going on the bond after he came back from a trip outside, isn't that right?

A. Mr. Olday said he would go on the bond after he came back from a trip outside.

Q. He said positively that he would?

A. Yes, sir.

Q. Do you know why he didn't go on the bond before he went outside if he made such a promise?

A. Well, he talked to me on the telephone and he told me he was at the International Airport and he was leaving for outside at that time and as soon as he came back he would make [711] arrangements and would I let Tope go to work on his say so, that he would procure a bond.

Q. Did you discuss with Mr. Olday in that conversation that in the event Tope didn't get a bond that he could go ahead and do it on some hourly or rental basis? A. I did not.

Q. All right. When did Mr. Olday come back from his trip outside?

A. I believe it was the latter part of January.

Q. You recall testifying in response to questions on a deposition that it was about the middle of January? A. It could have been.

(Testimony of Carl E. Oaks.)

Q. Did you contact Mr. Olday or did he contact you concerning the bond?

A. I believe I contacted him.

Q. And did he tell you that he could not go the bond? A. Yes; he did.

Q. Did he tell you that he had contacted an agency or two here in town and was warned away from the bond?

A. I don't recall the conversation just like that. There was some mention that he tried to get a bond, I believe.

Q. He did tell you definitely that he wouldn't go the bond, didn't he? A. Yes.

Q. Did you tell him that there was a fee of \$3,000.00 in it if [712] he would go the bond?

A. No.

Q. If I told you that he had testified in a deposition that that offer had been made to him to go the bond, would you say that he was mistaken?

A. That I made the offer, or Oaks Construction Company made the offer?

Q. Yes. That the statement had been made by you that there was \$3,000.00 for him if he would go the bond. Would that be correct?

A. That we would—I don't understand you, Mr. Nesbett. I am sorry.

Q. If I told you that Mr. Olday had stated in a deposition that you had said to him, "There is \$3,000.00 in it if you will go the bond," would you say that he was incorrect or mistaken?

A. Yes.

(Testimony of Carl E. Oaks.)

Q. No such statement was ever made?

A. No.

Q. But he did say that he wasn't going to go the bond, didn't he? A. Yes.

Q. And that would be approximately in the middle of January?

A. Some time around there. It was after the middle of January.

Q. Mr. Tope was up on the job, wasn't he? [713]

A. Yes.

Q. Now, you had previously told Mr. Tope that he couldn't go on the job at all unless there was a bond, hadn't you? A. I had.

Q. But you let him go on, nevertheless, on Olday's promise, is that right?

A. That is right.

Q. Now, after Olday had said that he would not go the bond, you didn't write Tope any letters or tell him to get off the job, did you?

A. No; we didn't.

Q. Now, when were you awarded your subcontract by Williams Brothers, Mr. Oaks, approximately? A. November of 1953.

Q. And had you driven along the highway and inspected as much of the area as possible just prior to being awarded the contract?

A. We had driven over it prior to bidding on it.

Q. Approximately when did you drive over it?

A. In September of 1953.

Q. Did you fly over it or drive?

A. Drove over.

(Testimony of Carl E. Oaks.)

Q. Well, there was no snow on the ground at that time, was there, or very little?

A. There was snow in spots but very little. [714]

Q. Very little. Now, when you testified that in your opinion, after looking it over, Tope's section was the easiest section to clear, was your estimate of the ease or ability to clear the given section as based on the nature of the terrain, whether it was steep, hillside, timber covered, brush or what factors influenced you?

A. There was many factors that would enter into it. The roughness of the terrain, the heaviness of the timber, the—it was rough, rocky areas, how steep the hillsides were, just the general, everything you would have to look at to figure on bidding a job like that.

Q. Generally speaking in sizing up an area with respect to the ease of clearing it, the amount of timber that is on there is really one of the big factors, isn't it?

A. Yes; it is.

Q. And in making your—in reaching a decision that Tope's section would be the easiest to clear, did you bear in mind that the area that contained lots of rock would be snowed over level with the rocks in the wintertime when the tractors were attempting to operate in that area?

A. Yes.

Q. You looked forward and saw that contingency, did you?

A. Yes.

Q. You knew that would be difficult?

A. Each section had like areas. [715]

Q. And you knew then that that would be dif-

(Testimony of Carl E. Oaks.)

icult but nevertheless you still felt that Tope's section was the easiest? A. Yes, sir.

Q. Now, I believe you said you were only on Tope's section possibly two or three times during the entire job? A. Yes.

Q. Did you hire the McLaughlin cats that went over to work on his section?

A. No. I personally didn't hire them, no.

Q. Did you make the preliminary arrangements for them? A. No.

Q. Who did do that, Tope?

A. I think Mr. Tope had tried to get the tractors.

Q. What do you know about the renting or leasing of those cats to go over to Tope's section?

A. Beg your pardon.

Q. What do you know about the arrangements that led up to the use of those cats on Tope's section?

A. It was very apparent that there had to be more tractors. Mr. Tope had tried to rent them from McLaughlin and they would not rent them to him. And I believe it was Jerry Noonan and Mr. Crawford—

Q. Jerry Noonan and who?

A. Mr. Crawford initially talked to somebody in McLaughlin Company about them, seeing if they could get them—rent them to [716] put on this job.

Q. Jerry Noonan and Crawford made the final arrangements? A. I believe so.

Q. Don't you know?

(Testimony of Carl E. Oaks.)

A. I was not there.

Q. Well, weren't you directing the operation in general here from Anchorage?

A. Just the over-all picture, yes, but I wasn't in on any of those details.

Q. And you had nothing to do with it, actually, directly at all, is that correct?

A. Not with the McLaughlin's cats.

Q. Did you have anything to do with the Rogers-Babler cat that went on the job?

A. Yes; I did.

Q. And what did you have to do with that arrangement?

A. I made arrangements to rent it.

Q. With whom?

A. Howard McInroy, I believe.

Q. Who? A. Howard McInroy.

Q. Is he here in Anchorage?

A. No; not now.

Q. Well, he was at that time, was he?

A. Yes. [717]

Q. And where was the caterpillar?

A. In Anchorage.

Q. Did you make the arrangements that caused it to be transferred up to Tope's section?

A. I did.

Q. Now, did you hire Mr. Abbott?

A. Yes.

Q. Did you hire Mr. Wilcox, one of the cat operators that started out on Mr. Tope's cats?

A. No.

(Testimony of Carl E. Oaks.)

Q. You had nothing to do with that?

A. No.

Q. Do you know who hired him?

A. Mr. Tope.

Q. Mr. Tope hired him. Did you have anything to do with hiring any of the men that went out on his cats when the job first started?

A. Yes, I did. There were several men that had worked for us during the summer of 1953 that Mr. Tope said he would like to have on his job and we just made arrangements with the men to go to work for Mr. Tope.

Q. You made arrangements?

A. At Mr. Tope's request.

Q. Well, did he tell you that "I want some of your men to go on my cats"?

A. Yes, sir. [718]

Q. And you said "All right. I will let you have some of the men."

A. The men were not working for us at that time. Possibly got ahold of the men and told them that Mr. Tope wanted them.

Q. Well, why did Tope have to check with you if the men were not working for you at the time?

A. He didn't have to.

Q. He just did it any way?

A. That is right.

Q. As a matter of courtesy?

A. I imagine.

Q. Did you hire this fellow Lucas who testified here today?

A. Yes, I did.

(Testimony of Carl E. Oaks.)

Q. Where did you hire him?

A. In Anchorage.

Q. Did you send him up on the job?

A. Yes.

Q. Did you tell him to report to Vincent Abbott?

A. I believe I told him to report to the job; I don't recall making any reference to Mr. Abbott.

Q. Now, at the time Tope went up on the job you had told him you would carry all his payrolls, hadn't you? A. Yes.

Q. And did you tell him that—Did you ever discuss the matter of insurance, workmen's compensation, and so on? [719]

A. If we were going to carry his payroll, we would have to in the normal course of business carry the payroll, payroll taxes and insurance.

Q. You did carry them, didn't you?

A. Yes.

Q. And did you guarantee his fuel bills for his cats? A. Yes, we did.

Q. He told you he had no money?

A. Yes.

Q. You knew he went up on the job broke?

A. We advanced him money to go to work.

Q. Now, do you recall approximately when you hired the Rogers-Babler cat?

A. In February, 1954.

Q. February of '54. And do you know when the McLaughlin cats went on the job?

A. Around the first of March.

(Testimony of Carl E. Oaks.)

Q. Of 1954? Now, I believe you wrote or caused to be written a letter to Stuart Construction Company in April, about April 16 of 1954, did you not, advising him that you were taking over under Paragraph 17 of the contract? A. Yes.

Q. Do you recall that letter?

A. Yes, I do.

Q. Exhibit 6 in this case? [720]

A. Yes.

Q. At the time that letter was written, the Rogers-Babler cat was on the job, was it?

A. Yes, it was.

Q. And the McLaughlin cats were on the job?

A. Yes.

Q. And Lucas was on the job? A. Yes.

Q. Prior to this pipeline clearance job and in the late summer and fall of 1953 you had had occasion to use one or two of Mr. Tope's cats, hadn't you? A. Yes, we had.

Q. The same cats that went up on this pipeline clearing job? A. Yes.

Q. You used one of them on the Solano job, didn't you? A. Yes.

Q. You leased that from him at what you described as a bare rental arrangement, didn't you?

A. Yes, we did.

Q. That is where you just take the cat over yourself and put it on the job and furnish your own driver and fuel oil and maintenance and so forth and pay him so much per month, is that right?

A. That's right.

(Testimony of Carl E. Oaks.)

Q. For the month of August 1 to August 31 of 1953, you paid him [721] \$2500 per month under that arrangement for a D-8, didn't you?

A. I couldn't remember.

Q. You couldn't remember? A. No.

Q. Would that sound about right for a D-8 on a bare rental?

A. I would say at that time it was about \$500 too high. I think if I—my memory doesn't fail me, a D-8 bare rental at that time, rented for about \$1,995.00

Q. Bare?

A. That included the dozer power control unit, but unoperated and maintained.

Q. And that would be for a season of summer operation? A. Yes, sir.

Q. Now, ordinarily even on a bare rental arrangement, if the owner of the cat who contemplates renting it on bare rental knows that it is going into an area such as the pipeline clearance job, was in the midwinter, wouldn't there be a premium charge made for the weather and so forth? A. No.

Q. There would not? A. No.

Q. That's not customary in the business?

A. No.

Q. Would rental rates in the winter be the same as in the [722] summer? A. Yes.

Q. Now, I believe you examined Exhibit 2, Mr. Oaks, which is a cost of operations analysis sub-

(Testimony of Carl E. Oaks.)

mitted by Mr. Tope here as evidence, and stated that in your opinion——

A. Exhibit 2 is that?

Q. Exhibit 2, sir. Have you got it. And stated, did you not, in your opinion that for example, the item shown as lubrication and maintenance, \$10.98, was inadequate and insufficient?

A. \$10.98 per week, yes.

Q. Did you—Have you examined the explanatory item at the bottom of the page as to how that figure was arrived at?

A. Yes, I have.

Q. Number 4, I believe—Excuse me. Number 5?

A. Yes, I have.

Q. Do you still feel that an item of \$10.98 per week is insufficient?

A. Yes, I do.

Q. Do you have any criticism, Mr. Oaks, of the \$27.00 per week for prestone and miscellaneous lubricants?

A. No, sir.

Q. Or with the oil or fuel oil consumption figures?

A. No, sir.

Q. And payroll, of course not. Now, have you, yourself, set out and prepared something that might assist the Court in [723] getting a picture of what you think would be the normal operating costs under a similar situation?

A. No, we have not.

Q. Well, Mr. Oaks, referring again to the Solano job and the leasing of Mr. Tope's cat, you don't recall the bare rental rate you agreed to pay him on that job, do you?

A. No, I do not.

(Testimony of Carl E. Oaks.)

Q. Are you sure that it was not \$2,500 per month?

A. No, I am not sure it wasn't. If I may, I think I can make that easier for you, Mr. Nesbett. Thinking about it I believe we did pay Mr. Tope more than what the normal monthly rental would have been but he was to furnish all repair parts for his tractors.

Q. Well, you agreed to pay him, didn't you—wasn't there—didn't he render you a statement from August 1 covering August 1-31 for items——

A. I don't recall; he no doubt did render a statement but I don't recall.

Q. Well, if he rendered one to you in the sum of \$2,500, would it be your testimony that that would cover any of the parts that had to be furnished?

A. I believe that was the arrangement on that job.

Q. Now——

A. I do know he brought parts up to that job himself for his tractors. [724]

Q. Mr. Oaks, I believe you compared Plaintiff's Exhibit 2, which is the cost of operation analysis with Exhibit 9, which is a copy of the settlement you made with Northern Commercial Company, and noted the difference in the total sum allowed for parts used on this pipeline clearing? A. Yes.

Q. Exhibit 2 showing \$3,232.98 and Exhibit 8 showing that you had agreed to pay Northern Commercial Company \$5,465.97.

Mr. Dunn: Your Honor, I have to object to that

(Testimony of Carl E. Oaks.)

question because it is misleading. The \$5,000 figure the witness did not testify and there is no contention referred to total parts on the pipeline. It referred to monies paid NC Company for these three cats, the same three cats that are on Exhibit 2. It is not total parts.

The Court: Is that your recollection?

Mr. Nesbett: I hadn't asked the question. I was making a preliminary statement as to what I thought his testimony was. He said "Yes, I did"——

The Court: The witness can answer according to his recollection.

Q. Now, did anyone in Northern Commercial Company explain to you, or were you aware of how they had arrived at the total of \$5,465.97, as being parts furnished to Tope on that job?

A. That is what they told us it was.

Q. The total of parts furnished? [725]

A. Yes, sir.

Q. I believe you testified, did you not, that in your experience operating up in that area under those conditions, \$3,232 would not be enough to cover the parts used, is that right?

A. Not on those tractors.

Q. What do you figure, based on your experience, the cost of parts for those tractors would be under those conditions?

Mr. Dunn: Well, your Honor, the best evidence is already in.

(Testimony of Carl E. Oaks.)

The Court: Well, he is asking this witness if he has——

Mr. Nesbett: I will object to being interrupted. I am asking the witness' opinion.

The Court: Yes.

A. Well, I know that it was \$5,000 some odd dollars figure that we paid NC Company. I also know it was more than that because we furnished Mr. Tope parts out of our warehouse. I couldn't make an estimate of what it should be.

Q. Well, I thought possibly you could if you were convinced \$3,232 was too little. If you can't, just say so.

A. No, I can't.

Q. Now, you were present in Fairbanks when this settlement agreement was reached with Northern Commercial Company, weren't you?

A. Yes.

Q. Who else was present at that [726] settlement?

A. Truman Sage of Northern Commercial Company.

Q. Was Mr. Stuart Tope present at any time during any of those discussions that led up to the settlement?

A. Just this one discussion that I was on, and Mr. Tope was not there.

Q. Were you or your organization ever asked to appear in Fairbanks any time during the month of August to enter into a conversation with Tope and Northern Commercial Company?

A. Yes, we had.

(Testimony of Carl E. Oaks.)

Q. You didn't go to that conference, did you?

A. No.

Q. As a matter of fact, you sent your office manager, Hancock, up, didn't you?

A. He was—went to Fairbanks, yes.

Q. Hancock was instructed though to go to Fairbanks, but not to meet with Tope, was he not?

A. I don't recall if he was instructed not to meet with Tope. He didn't meet with Tope.

Q. He went in as a matter of fact the day before the date set for the meeting and didn't attend on the day of the meeting, isn't that right?

A. That is right.

Q. Why didn't you go up to the meeting, Mr. Oaks? A. I couldn't go.

Q. Well, wasn't your advance from Williams Company tied up [727] because of that Northern Commercial matter?

A. No, by that time we had gotten it released from Williams Brothers.

Q. That had been accomplished by your bonding company, hadn't it? A. Yes.

Q. So you weren't short of cash any more. You were short of cash at first when they first held up your monies from Williams, weren't you?

A. Yes, we were.

Q. Well, didn't you want Mr. Hancock at least to represent your organization in a discussion with Northern Commercial Company and Tope?

A. We had had so much trouble trying to get Mr.—We had tried to get Mr. Tope to come into

(Testimony of Carl E. Oaks.)

our office and go over his entire account with us and we could never get him to come in there. By that time, through him there had been so much trouble caused I could see no reason for having a meeting with Mr. Tope at Fairbanks.

Q. Mr. Tope wanted to meet with Williams Brothers, too, didn't he? A. Yes, he did.

Q. He wrote you to that effect, didn't he?

A. No, he didn't.

Q. He telephoned you, didn't he? Is that [728] right?

A. I believe he telephoned the girl that worked in our office.

Q. Didn't you write him then and tell him you wouldn't meet with any representative of Williams Brothers or with Northern Commercial Company?

A. I know we wrote that we would not meet with him with Williams. I don't know if we wrote about Northern Commercial Company or not.

Q. Now, I believe the terms of Exhibit 9, the settlement with Northern Commercial Company by Oaks Construction Company provided that Oaks agreed to pay Northern Commercial Company \$5,465.97 for what was agreed to be spare parts used. Is that not right?

A. I believe that's right.

Q. Oaks agreed also to pay Northern Commercial Company \$5,000.00 as a compromising figure over the rentals claimed for the cats during the time they were used, is that not right?

A. Yes, sir.

(Testimony of Carl E. Oaks.)

Q. Now, do you know how you arrived at that \$5,000 figure as a compromise rental payment?

A. I believe we showed Mr. Sage the actual time that these tractors had worked on the job. It was one of the contributing factors. I don't recall all the details why it was arrived just like that.

Q. You knew that Stuart E. Tope, as an individual, was buying this equipment that was the subject of the discussion from [729] Northern Commercial Company, didn't you? A. Yes.

Q. Did you look at the contracts that he was a party to? A. I did not.

Q. At the time you were negotiating a settlement? A. No.

Q. Is it your testimony, Mr. Oaks, that in entering into this compromise rental agreement that you were considering the total number of hours that you thought Tope's machinery had been used rather than the total amount of rentals that would have accrued to Northern Commercial Company under their contracts?

A. We just showed him the time the tractors had worked on the job. And it was considerable less than the billing that we owe to Stuart Construction Company, which we received a copy of.

Q. Did you purport to enter into any agreement with Northern Commercial Company that it was to cover the entire time the cats were used on the job?

A. Yes.

Q. Well didn't you feel that Stuart Tope should be in there and a party to any such agreement?

(Testimony of Carl E. Oaks.)

A. We were not settling Stuart Construction Company's account or Stuart Tope's account.

Q. You were attempting to settle all of Tope's claims for hours [730] of use with NC though, weren't you?

A. We were just trying to arrive at a settlement with NC Company whereby they would not sue us for that account.

Q. But all NC Company were concerned about was the delinquent monthly rentals, wasn't it?

A. I imagine. I am not sure what NC was concerned about.

Q. But it is your testimony that you settled off with a total number of hours that the cats were used on a compromise basis, is that it?

A. Yes, sir.

Q. Without Tope being present?

A. Yes, sir.

Q. I show you Exhibit 9. Isn't it a fact that the total settlement figure was \$10,798 and some cents?

A. Yes, sir.

Q. Has all of that amount been paid, Mr. Oaks, or do you know?

A. It has been paid.

Q. To Northern Commercial Company?

A. Yes.

Q. By Oaks?

A. There was \$5,000 figure paid by Oaks Construction Company and at a later date there was a balance, whatever it was, paid by Oaks Construction Company, Inc.

Q. There was a balance carried against Oaks by the Fairbanks Office for some period of time,

(Testimony of Carl E. Oaks.)

wasn't there? [731] A. Yes, there was.

Q. That balance was later transferred by the Northern Commercial Company's Fairbanks office to the Northern Commercial Company office in Anchorage, wasn't it? A. I wouldn't know.

Q. At the time you entered into this settlement in October of 1954, you were considerably indebted to Northern Commercial Company, weren't you?

A. Yes, we were.

Q. Was it in the approximate sum of \$150 to \$200,000?

Mr. Dunn: Your Honor, I object to this. He went into that before. I don't see what Oaks' indebtedness to NC Company has to do.

The Court: It is with reference to the settlement; I presume that is the reason for it.

Mr. Nesbett: Yes.

Q. Was it approximately in those figures, Mr. Oaks?

A. It was in the neighborhood of \$150,000.00.

Q. You haven't paid that Bayless claim, that balance of \$3,000, odd dollars, yet have you, Mr. Oaks? A. No, we have not.

Q. You intend to pay it some time, do you?

A. I told Mr. Bayless that we would pay it some time.

Q. Is the only reason you haven't paid it because you haven't had the money now? [732]

A. That is right.

Mr. Nesbett: I think that's all, your Honor.

The Court: Any redirect?

Mr. Dunn: Very short, your Honor.

(Testimony of Carl E. Oaks.)

Redirect Examination

By Mr. Dunn:

Q. Mr. Tope—— A. I beg your pardon.

Q. I am sorry, sir. I was looking at my notes. Mr. Oaks, Mr. Nesbett questioned you concerning not kicking Tope off the job when Olday fell through with his promise. You did start and immediately start demand and continued to demand a bond from Tope right on out?

Mr. Nesbett: I'll object to the leading question, your Honor. After all this is still somewhat in direct.

Mr. Dunn: Quite a ways from direct.

The Court: Let the witness answer so we can get along.

Mr. Dunn: That is the idea of it.

A. Yes.

Q. Did you finally kick Tope off the job?

A. No, we did not kick him off.

Q. How did he come to leave? A. He left.

Q. Walked off? A. Yes. [733]

Q. I am confused on this testimony concerning the Solano job. Did you state whether or not you knew how much a month you paid Tope for one of his cats?

A. I didn't state how much we paid him, no.

Q. Do you know? A. No, I don't.

Q. When was that job?

A. 1953. July, August and September, I believe.

Q. Finished in August or September of '53?

(Testimony of Carl E. Oaks.)

A. Finished in October of 1953.

Q. You testified on cross-examination, did you not, that you never prepared any tally of operating costs?

The Court: He said that—in direct examination and cross-examination.

Q. By that do you mean of Tope's cats?

A. Yes.

Q. Did you not have Mr. Hancock prepare an operating cost of the overall job? A. Yes.

Q. It has been admitted in evidence here, hasn't it? A. Yes.

Mr. Dunn: No further questions, your Honor.

The Court: Is that all now? Any further cross?

Mr. Nesbett: No, your Honor.

Mr. Dunn: Your Honor, I would like to substitute—well, [734] wait a minute. Perhaps I better identify this.

Q. (By Mr. Dunn): Can you identify this instrument, Mr. Oaks?

The Court: Is that the contract?

Mr. Dunn: It is the original one, yes, sir.

Q. Is that the original contract?

A. Yes, it is.

Mr. Dunn: I would like to substitute this for Plaintiff's Exhibit 1. He said there are some pages missing on that copy.

(Mr. Oaks left the witness stand and returned to his seat.)

The Court: And also on the one attached to the complaint.

(Testimony of Carl E. Oaks.)

Mr. Dunn: I didn't know.

The Court: Well I—at least I—rapid check—it appeared that way to me.

Mr. Dunn: Do you have any objection to the substitution?

Mr. Nesbett: No. I think it should be done. I just want to look at it.

The Court: 5, 6, 7 and 8?

Mr. Nesbett: Yes, your Honor. Could I ask Mr. Oaks a question where he is?

The Court: He might answer it right there if it is not objectionable to you.

Mr. Dunn: No. [735]

Recross-Examination

By Mr. Nesbett:

Q. Looking at Article 5 and 6 it occurs to me, Mr. Oaks, if you agreed to advance the payrolls and agreed to pay the payroll expenses that ordinarily go along with it, such as taxes and so on, why didn't you cover that in your contract?

A. I believe that was taken up after that was signed.

Q. Your contract was written as though the contracting party was going out and completely finance the job, isn't it? A. That is right.

Q. Well, why didn't you alter it to provide for the actual situation if that was such a common practice?

A. Apparently we didn't consider it necessary.

(Testimony of Carl E. Oaks.)

Redirect Examination

By Mr. Dunn:

Q. Did Mr. Tope request any such alteration?

A. No, he didn't.

Mr. Nesbett: I have no objection, your Honor, to this.

The Court: Well, I think it ought to be admitted if it was the original contract; then I would understand.

Mr. Nesbett: It would be Exhibit 1.

The Court: And be substituted for an Exhibit 1?

Mr. Dunn: That is right. Why don't you return the one you have to Mr. Nesbett? That was his.

The Court: Now, gentlemen, is that all your testimony? [736]

Mr. Dunn: Yes, sir.

The Court: Have you rested?

Mr. Dunn: Yes, sir.

The Court: Plaintiff, defendant rests.

Mr. Nesbett: Your Honor, I have Mr. Tope on rebuttal. It won't be too long. We still have argument. I don't know how your Honor feels on that.

The Court: Well——

Mr. Nesbett: Whether we should try to finish today. I don't know what your Honor's thoughts are.

The Court: I'd like to get to work on those cases Monday morning and if the argument, if the rebuttal is short, I think we ought to go along with it, if the attaches of the Court are willing. It will just be a couple of questions?

Mr. Nesbett: On rebuttal.

The Court: I don't want to hurry you gentlemen. I'd rather adjourn until Monday if it unduly hurries you because you have the right to try it in your way.

Mr. Nesbett: Did your Honor plan to have us argue the case or do you want us to argue?

The Court: I thought we would talk about it after the evidence is in.

Mr. Nesbett: I see.

The Court: Suppose Mr. Tope——

Mr. Nesbett: I will call Mr. Tope, your Honor, then [737] for these questions.

(Mr. Tope resumed the witness stand.)

STUART E. TOPE

Direct Examination—Rebuttal

By Mr. Nesbett:

Q. Could I see the deposition of Vincent Abbott. Mr. Tope, you were in Court this morning when Mr. Dunn and I read the deposition of Vincent Abbott, were you not? A. Yes.

Q. Did you have the authority on that pipeline that Mr. Abbott referred to as being your prerogative? A. I did not.

Q. Did you hear Mr. Abbott testify that he had twenty-four years of experience in heavy equipment and construction? A. Yes, I did.

Q. Most of which was in a supervisory capacity? A. That is right.

(Testimony of Stuart E. Tope.)

Q. Was the first time you ever saw him when he appeared up on that pipeline to go to work?

A. No, I saw him at Solano.

Q. I see. How old a man was Mr. Abbott?

A. Between 38 and 40, I presume; I just don't know.

Q. Are you just guessing?

A. I imagine he would be like that. I don't know exactly. I don't know.

Q. Now, he referred in his testimony to the inadvisability of [738] idling caterpillars in sub-zero weather for long periods of time. You heard that testimony, did you not?

A. Yes, I did.

Q. I'll ask you whether or not you received any instructions from caterpillar representatives in Fairbanks, Alaska, prior to going on this job concerning the same practice?

A. Yes, I did.

Q. And what did they tell you?

Mr. Dunn: Objection, your Honor, hearsay.

The Court: It would be hearsay. He can give his opinion from his experience as to whether idling was good for the tractor or not good for it, but whatever instructions he gave would be hearsay.

Q. Were those instructions or statements made to you by caterpillar representatives, represented to be general advice from Caterpillar to users concerning the use of the equipment?

A. That is right.

Mr. Nesbett: Your Honor, I think it would be admissible now to state what he——

(Testimony of Stuart E. Tope.)

The Court: Well, that then is according to his——

Mr. Dunn: Just another way of saying the same thing.

The Court: I know, but he has a right to qualify himself as an expert and being familiar with them and give his opinion. He bases his opinion upon what he had heard.

Q. Simply what was it then, Mr. Tope? [739]

A. I went into a Mr. Cassidy, who is the master mechanic for the Northern Commercial Company.

Q. Don't quote a lot of discussion with Cassidy. What in general did he tell you concerning the advisability or inadvisability of idling a caterpillar?

Mr. Dunn: Hearsay, your Honor, I object.

The Court: Let's hear it.

A. He said it is okay if you idle a cat up to 8, 6 RPM's as long as they were in cold weather.

Q. Do you know whether the practice of idling a cat 24 hours per day is followed in cold weather on Alaskan construction jobs?

A. Yes, they are.

Q. Do you know any particular jobs where the practice is followed?

A. Up in Nome Section, they run the cats 24 hours a day.

Q. How about the Point Barrow job?

A. And on the Point Barrow job, too.

Q. You weren't on either of those jobs?

A. No.

(Testimony of Stuart E. Tope.)

Q. Do you know that from discussions with caterpillar people?

A. With Mr. Allred and Mr. Harlan, who has testified here.

Q. Now when you left that pipeline job, did you testify that you had one caterpillar still operating and on the job? A. Yes, I did. [740]

Q. And did that caterpillar stay on the job after you left? A. Yes, it did.

Q. Were you in the immediate area working on another of your cats? A. Yes, I was.

Q. Do you know that your caterpillar, the last one on the job, was used up to May 1st?

A. Yes.

Q. Now, you heard the deposition of Roy Crawford read. Did you have the authority on that job that Roy Crawford referred to you as having, a complete say-so except that he would consult with you on occasions?

A. You will have to repeat that, please.

Q. Did you have the authority that he referred to you as having? A. No, I did not.

Q. Well, who was running the job when you and Crawford were present? A. Mr. Hager.

Q. And who was over Mr. Hager?

A. Mr. Crawford.

Q. Well, did Mr. Crawford give you on occasion orders? A. Yes, he did.

The Court: I think all of that was brought out on direct.

Mr. Nesbett: I know it was, your Honor. I just

(Testimony of Stuart E. Tope.)

wanted [741] to cover the deposition generally. I think that is all, your Honor.

The Court: Any cross?

Mr. Dunn: Yes, sir.

Cross-Examination—Rebuttal

By Mr. Dunn:

Q. You had quite a bit of maintenance trouble on this job, did you not, Mr. Tope?

A. After we went through the rock pile, yes.

Q. Did you have quite a bit of maintenance trouble?

A. I don't know how to answer that.

The Court: He said he had a great deal after he went through the rocks. Now then, you can ask him if he had any before.

Q. Did you say you had one cat left when you left that job? A. Yes.

Mr. Dunn: No further questions.

Mr. Nesbett: That is all.

The Court: Gentlemen, is that all the testimony?

Mr. Nesbett: That is all, your Honor.

Mr. Dunn: Yes, sir.

The Court: Would you gentlemen, would you come up Monday morning and we will talk about the question of argument and what ought to be done in the future. My impression now is that it would be far more satisfactory—it is important; every [742] lawsuit is important to the litigants and it is important to these parties, and I am—want you to consider the suggestion I am about to make

and that is you provide briefs for me, both of the facts and the law, and give me a little opportunity to think it over. I think it is too important for me to undertake to render a decision immediately. I don't think that ought to be done in this case. Now, would that be agreeable with you gentlemen? If that is true, now you are entitled to be heard on argument, oral argument, if you want to make oral arguments, but I think a briefing of the case supplying me with what you concede to be the facts of the case, briefly the facts and briefly the law, would be far more satisfactory in that you can make your written arguments of the same data. I don't want to deprive counsel of their right to make an oral argument Monday morning. What do you say, Mr.—I wish you'd think it over and both of you come here Monday morning and tell me what you want to do.

Mr. Dunn: Well——

The Court: We wouldn't have time to hear arguments tonight. It wouldn't be fair to the officers of the Court.

Mr. Dunn: Is your Honor asking that the argument be written, too?

The Court: Well, if you want to make an argument, usually they are. When you brief the case, when the rule is that you make your argument——

Mr. Dunn: When would your Honor want this?

The Court: I would leave that to counsel. I would [743] want it speedily, of course, as counsel could reasonably get it done. Can we talk about that Monday morning?

Mr. Nesbett: Yes, your Honor, as far as I am concerned.

Mr. Dunn: All right, sir.

The Court: So I will take the files with me and with my notes, and everything.

Let the Court stand recessed until 10:00 o'clock Monday morning.

(The Court recessed at 5:10 p.m., August 15, 1958.)

(On Monday, August 18, 1958, it was agreed by both parties that their briefs would be filed on or before Thursday, August 28, 1958, to be considered by the Court after his return to Kansas City and thereafter the Court would render an opinion.)

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on August 11, 12, 13, 14 & 15, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed April 20, 1959.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, as designated by counsel for the appellants and counsel for the appellees.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from the Judgment filed and entered in the above-entitled Cause, dated October 23, 1958, and docketed November 7, 1958, and from the Order filed and entered in the above-entitled cause, dated December 11, 1958, and docketed December 15, 1958.

Dated at Anchorage, Alaska, this 23rd day of April, 1959.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 16470. United States Court of Appeals for the Ninth Circuit. Carl E. Oaks, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., Appellents, vs. Stuart Construction Co., Inc., a Corporation, and Stuart E. Tope, Respondent. Transcript of Record. Appeal from the District Court of the District of Alaska, Third Division.

Filed May 8, 1959.

Docketed: May 18, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16470

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN d/b/a OAKS CONSTRUCTION
COMPANY, WILLIAMS BROTHERS COM-
PANY, McLAUGHLIN, INC., and MAR-
WELL CONSTRUCTION COMPANY, LTD.,

Appellants,

vs.

UNITED STATES OF AMERICA, for the Use
and Benefit of STUART CONSTRUCTION
CO., INC., a Corporation, and STUART E.
TOPE, an Individual,

Appellee.

STATEMENT OF POINTS

Appellants Carl E. Oaks, Williams Brothers
Company, McLaughlin, Inc., and Marwell Con-
struction Company, Ltd., hereby make the following
statement of points:

(1) Defendant's motions to dismiss should have
been granted.

(2) Motions for summary judgment on the First
Cause of Action should have been granted.

(3) Defendants Williams Brothers Company,
McLaughlin, Inc., and Marwell Construction Com-
pany, Ltd., are entitled to judgment against plain-
iffs, jointly and severally, for costs.

(4) No recovery should be allowed plaintiffs; and Oaks Construction Company is entitled to judgment against plaintiffs, jointly and severally, on its counter-claim.

(5) Any recovery allowed should be based on the written subcontract of December 17, 1953.

(6) An agreement to do that which one already has a binding contractual obligation to do fails for lack of consideration; therefore, the written contract of December 17, 1953, precludes recovery on all other contended, contractual basis.

(7) The alter ego theory is applicable here, and Stuart E. Tope and Stuart Construction Company, Inc., are one and the same legal entity.

(8) Judgment cannot be recovered against a sole individual, even though he be a partner, on a strict partnership transaction.

(9) Neither of plaintiffs is the real party in interest.

(10) Oaks Construction Company is entitled to full credit for all monies paid Northern Commercial Company.

(11) Interest is not recoverable on an unliquidated amount.

(12) A plaintiff cannot recover more than the amount sought in the complaint.

(13) The evidence does not support a bare, rental value of \$35.00 an hour for caterpillar tractors.

/s/ JOHN C. DUNN,

Attorney for Appellants.

[Endorsed]: Filed May 15, 1959.